Supreme Court, U.S.
FILED
JAN 17 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-886

STRACHAN SHIPPING COMPANY, ET AL, *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

NO. 71-890

C. V. RORIE, JR., *Petitioner*

v.

CITY OF GALVESTON, *Respondent*

APPENDIX

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OPINIONS BELOW

OPINIONS OF THE SUPREME COURT OF TEXAS
C. V. RORIE, JR. et al v. CITY OF GALVESTON

No. B-2326

From Galveston County, Fourteenth District.

Writs of error granted October 28, 1970. (14 Tex. Sup. Ct. Jour. 47) (Opinion of CCA 456 S.W.2d 421)

Judgment of the Court of Civil Appeals reversed and judgment of the Trial Court affirmed. (Opinion of the Court by Associate Justice Walker. Associate Justices Denton and Daniel not sitting.)

For Petitioners: Eikel and Goller, Robert Eikel and Theodore Goller, Houston, Texas. Fulbright, Crooker, Freeman, Bates and Jaworski, Dixie Smith, Houston, Texas. Mandell and Wright, Arthur J. Mandell, Houston, Texas, Royston, Rayzor and Cook, Bryan F. Williams, Jr., Galveston, Texas.

For Respondent: McLeod, Alexander, Powel and Apffel, V. W. McLeod and Ben R. Powel, Galveston, Texas.

This suit was brought by C. V. Rorie, Jr., a longshoreman, to recover for personal injuries sustained while working on board the S.S. Armagh in Galveston. On the controlling question presented by the appeal, we hold that the hoist operator whose negligence caused plaintiff's injuries was, as a matter of law, the borrowed servant of plaintiff's employer.

Plaintiff sought a recovery against Avenue Shipping Co., Ltd., and Trinder, Anderson & Co., Ltd., the owners and operators of the ship, hereinafter referred to collectively as the shipowner, and the City of Galveston, operator of the terminal facilities known as Galveston Wharves. Strachan Shipping Company which was the stevedoring company and Rorie's employer, was impleaded by cross-action of the City. The shipowner also filed a cross-action against Strachan, seeking indemnity for any sums it might be required to pay Rorie and a recovery of attorney's fees and other expenses incurred in defense of the suit. Strachan in turn sought judgment over against the City and the shipowner in the event any judgment was rendered against it. Texas Employers' Insurance Association, Strachan's compensation insurance carrier, intervened to recover the compensation and medical benefits paid to Rorie.

The S.S. Armagh was docked in the Port of Galveston for the purpose of discharging a cargo of bulk ore, and Strachan was employed by the shipowner to discharge the cargo. Rorie was one of the longshoremen employed by Strachan to assist in the operation. Strachan arranged to and did use a land-based mobile railway crane, sometimes referred to as a Brown hoist, owned by the City. The ore was scooped out of the ship's hold and transferred into railroad cars on the wharf with a clamshell bucket attached by cables to the hoist. Frank McPeters was the operator of the hoist, and he was assisted by a helper, Herman Ermis, who stayed on the wharf. Both McPeters and Ermis were in the general employ of the City. A flagman employed by Strachan was stationed on the deck of the vessel and gave signals to the crane operator, who was unable to see into the ship's hold.

Rorie was working in the lower hold at the time he was injured. A metal structure about four feet wide and seven feet high, referred to as a stanchion, extended through the center of the hold. On the occasion in question, the bucket struck the stanchion ladder either while it was being lowered into the hold or when it was swung suddenly and violently after being lowered into the hold. The bucket recocheted off the ladder and struck Rorie, thereby causing his injuries.

The jury: (1) refused to find the vessel unseaworthy or the shipowner negligent; (2) found in response to Special Issues Nos. 12 and 13 that plaintiff's injuries were proximately caused by the failure of the hoist operator to exercise ordinary care in its operation; (3) refused to find that the plaintiff was negligent; and (4) in response to Special Issues Nos. 18 and 25 refused to find that Strachan had the right to direct and control McPeters in the operation of the hoist, and found that McPeters was not a loaned employee of Strachan. The trial court concluded that McPeters was the loaned employee of Strachan as a matter of law. It accordingly granted the City's motion to disregard the jury's findings in response to Special Issues Nos. 18 and 25. Judgment was rendered that plaintiff take nothing and that the shipowner recover against Strachan the cost of defending the suit in the amount of $7,500.00.

The Court of Civil Appeals reversed the judgment of the trial court and remanded the cause for a new trial, holding: (1) that the jury's answers to Special Issues Nos. 18 and 25 are supported by the evidence, and (2) that Special Issues Nos. 12 and 13, upon which Rorie must rely to support any judgment in his favor, constitute an

improper global submission. 456 S.W.2d 421. All parties filed applications for writs of error, and all applications were granted. We reverse the judgment of the Court of Civil Appeals and affirm that of the trial court.

It is settled, of course, that a general employee of one person may become the special or borrowed employee of another employer. As we pointed out in Producers Chemical Co. v. McKay, Tex. Sup., 366 S.W.2d 220:

"Whether general employees of one employer have, in a given situation, become special or borrowed employees of another employer is often a difficult question, particularly when employees are furnished with machinery by their general employer to accomplish part of a project or contract undertaken by another. Solution of the question rests in right of control of the manner in which the employees perform the services necessary to the accomplishment of their ultimate obligation. If the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. If the employees remain under control of their general employer in the manner of performing their services, they remain employees of the general employer and he is liable for the consequence of their negligence.

* * *

"When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the question is relatively simple. . . ."

The two employers in this case did, in effect, expressly agree that Strachan would have the right to control the

hoist and its operator. The lease of the hoist is governed by Galveston Wharves Tariff Circular No. 4-B, which was published and filed with the Federal Maritime Commission on January 1, 1960. A copy was also sent to various shipping interests, including Strachan. The following provisions of the tariff are relevant here:

"When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc. are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risk for injuries or damages which may arise or grow out of the use or operation of said unit.

"It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters."

Although filed with the Federal Maritime Commission, the tariff has not been formally approved by the Commission. Rorie argues, and the Court of Civil Appeals held, that the tariff is an understanding or agreement that is required to be approved by the Commission under Section 15 of the Shipping Act, 1916, as amended. 46 U.S.C.A. § 814. We do not agree. The types of agreements or understandings that must be approved by the Commission

are set out in the statute which, at all times relevant here, provided as follows:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board [now Federal Maritime Commission] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working agreement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

* * *

"All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation."

The statute by its terms thus applies only to agreements: (1) fixing or regulating transportation rates or fares; (2) giving or receiving special rates, accommondations or

other special privileges or advantages; (3) controlling, regulating, preventing or destroying competition; (4) pooling or apportioning earnings, losses or traffic; (5) alloting ports or restricting or otherwise regulating the number and character of sailings between ports; (6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or (7) in any manner providing for an exclusive, preferential or cooperative working arrangement. The tariff in question, which is unilaterally promulgated and uniformly applicable to all who lease equipment from the terminal operator, does not fit any of the categories specified in the statute and in our opinion is not governed by its provisions. This is the view of the Commission, which has filed an amicus curiae brief expressing the opinion that the tariff of a terminal operator furnishing services in connection with common carriers by water becomes effective upon filing.

There is another reason, if one were required, for concluding that the tariff is effective as between Strachan and the City even though it was not approved by the Commission. The statute applies only to an agreement made by a common carrier by water or other person subject to the chapter "with another such carrier or other person subject to this chapter." The term "other person subject to this chapter" is defined as meaning any person not included in the term "common carrier by water" carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water. 46 U.S.C.A. § 801. Although the City's activities clearly bring it within this definition, there is nothing to suggest that Strachan is either a common carrier by water or "other person subject to this chapter" within the meaning of the statute.

Rorie cites a number of cases dealing with agreements falling into one or more of the categories specified in the statute. See Volkswagenwerk Aktiengesellschaft v. Federal Maritime Com., 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090; Port of Boston Marine Ter. Ass'n v. Boston Shipping Ass'n, 1st Cir., 420 F.2d 419, reversed, ___U.S.___, 91 S.Ct. 203, 27 L.Ed.2d 203; Matson Navigation Co. v. Federal Maritime Com., 9th Cir., 405 F.2d 796; Greater Baton Rouge Port Com. v. United States, 5th Cir., 287 F.2d 86; Anglo Canadian Shipping Co. v. United States, 9th Cir., 264 F.2d 405; River Plate & Brazil Conf. v. Pressed Steel Car Co., 2nd Cir., 227 F.2d 60. None of these decisions affords any basis for holding that a tariff published and filed by a terminal operator can have no effect until approved by the Commission. Rorie also suggests that the tariff in this case is comparable to the municipal charter and ordinance considered in National Bank of North America v. S. S. Oceanic Ondine, S.D. Tex., 315 F. Supp. 386. If he is correct in that respect, we simply do not agree with the second and alternative holding stated by the court in support of the judgment rendered in that case.

Rorie further contends that there is evidence to support the conclusion that Strachan did not have the right to control the hoist operator as provided in the tariff. The circumstances upon which he relies will be stated briefly. The hoist was owned and maintained by the City, and the operator was employed and paid by the City. Anyone leasing the hoist was required to use an operator furnished by the City. The hoist remained on the wharf, which was owned by the City, and Strachan was charged for its use on a tonnage rather than an hourly basis.

The City employed a supervisor of the hoist operators. This supervisor made a practice of observing the operations of the different hoists, and he would talk with the operator if he found "something that you don't operate just right." The supervisor was sitting in his automobile and watching the unloading of the S. S. Armagh at the time of the accident. There is also testimony that the stevedoring company does not attempt to direct the operator in his handling of the levers and controls of the hoist.

The hoist was an expensive and complicated piece of equipment and required an experienced operator. In the absence of an express agreement dealing with the right of control, this circumstance tends to support an inference that the owner of the equipment intended for his employees to protect the same and not submit to the control of an inexperienced special employer. See J. A. Robinson Sons, Inc. v. Wigart, Tex. Sup., 431 S.W.2d 327. It has little probative significance, however, when the parties have expressly agreed that the equipment and its operator will be under the control of the special employer. There is no evidence here that the City had ever interfered with a lessee's right to control the equipment and its operator, and it does not appear that the supervisor or any other representative of the City attempted to exercise any control over the manner in which McPeters operated the hoist in unloading the vessel for Strachan. In our opinion the evidence in this case will not support the conclusion that, despite the provisions of the tariff, McPeters remained under the City's control in his operation of the hoist on the occasion in question.

The tariff provisions quoted above are binding upon the City and upon all persons dealing with it. They en-

tered into and became part of the lease agreement between the City and Strachan. See Texas City Ter. Ry. Co. v. American Equit. Assur. Co., S.D. Tex., 130 F. Supp. 843, and authorities there cited. We thus have an agreement expressly vesting the right of control in Strachan, and there is no evidence that the City retained any right of control. In these circumstances the tariff is conclusive, and McPeters was the loaned employee of Strachan as a matter of law. Magnolia Petroleum Co. v. Francis, Tex. Civ. App., 169 S.W.2d 286 (wr. ref.); Steele v. Wells, Tex. Civ. App.; 134 S.W.2d 377 (wr. ref.); Southern S.S. Co.. v. Meyners, 5th Cir., 110 F.2d 376.

Rorie is correct in saying that Galveston Wharves has, for some purposes, the status of a common carrier by railroad. See Galveston Wharf Co. v. Galveston, H. & S. A. R. Co., 285 U.S. 127, 52 S.Ct. 342, 76 L.Ed. 659; United Industrial Workers, etc. v. Board of Trustees, etc., 5th Cir., 351 F.2d 183. It appears to us, however, that this is not material here. We recognize the general rule that a common carrier cannot stipulate for immunity from its own negligence. See United States v. Atlantic Mut. Ins. Co., 343 U.S. 236, 72 S.Ct. 666, 96 L.Ed. 907; Boston & M. R. Co. v. Piper, 246 U.S. 439, 38 S.Ct. 354, 62 L.Ed. 820. The tariff provisions now in question deal with the right to control operators of equipment leased from the City. They do not attempt to limit the responsibility of the City for its own fault or negligence, and they could expose the City to liability for injuries sustained by the operator of its equipment. See 33 U.S.C.A. § 905; Art. 8306, Sec. 3a, Vernon's Ann. Tex. Civ. Stat.; Process Engineering Co. of Ft. Worth v. Rosson, Tex. Civ. App., 287 S.W.2d 511 (no writ); Stroud v. Zuzich, Mo., 271

S.W.2d 549; Simmons v. Kansas City Jockey Club, 334 Mo. 99, 66 S.W.2d 119. In our opinion the tariff does not constitute an attempt by the City to limit its liability in contravention of the rule mentioned above.

The Texas Supreme Court, while holding that the gratuitous provision in the Tariff 4-b, as a matter of law establishes loaned servant relationship, also in fact overruled the Court of Civil Appeals opinion holding Special Issue No. 12 to be global in nature. This is evident by its affirmance of the Trial Court's judgment insofar as it awarded $7,500.00 as attorney's fees to the shipowners, stating as follows:

> "Strachan contended in the Court of Civil Appeals and insists here that the trial court erred in awarding the shipowner a recovery against it for the expense of defending the suit. Strachan's liability in this respect arises from a breach of the implied warranty of workmanlike service. See Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133. Where breach of the warranty is raised but not conclusively shown by the evidence, the shipowner has the burden of establishing a breach by obtaining findings that the stevedore failed to do the work properly or safely. See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed2d 798. There is no merit, however, in Strachan's contention that the judgment in favor of the shipowner is not supported by the verdict. *The jury found that Rorie's injuries were proximately caused by the negligence of the hoist operator,* and the evidence shows as a matter of law that the operator was the borrowed employee of Strachan at the time. Breach of the implied warranty is thus established. Strachan does not com-

plain of the charge and has consistently taken the position that Special Issues Nos. 12 and 13 were entirely proper."

RUEL C. WALKER,
Associate Justice.

Associate Justices Denton and Daniel not sitting.

Opinion delivered July 28, 1971.

No. 205.

Court of Civil Appeals of Texas,

Houston (14th Dist.).

C. V. RORIE, Jr., et al., Appellants,

v.

CITY OF GALVESTON, Appellee.

June 10, 1970.

Rehearing Denied July 8, 1970.

SAM D. JOHNSON, Justice.

C. V. Rorie, Jr., a longshoreman, brought this suit to recover damages for personal injuries sustained while working on board the ship SS Armagh in Galveston, Texas, on September 6, 1960. He named as defendants the City of Galveston, hereinafter sometimes called City and Avenue Shipping Co., Ltd., and Trinder, Anderson & Co., Ltd. the owners and operators of the ship SS Armagh, hereinafter collectively called shipowner.

Strachan Shipping Company was the stevedoring company and Rorie's employer. Strachan was impleaded by the cross-action of the City. Subsequently, the shipowner also filed a cross-action against Strachan seeking indemnity for any sums it might be required to pay to Rorie as a consequence of his suit. Strachan counterclaimed against both

defendants. Strachan's workmen's compensation insurance carrier, Texas Employers' Insurance Association, intervened to recover the compensation and medical payments made to Rorie as a consequence of his injuries on the ship.

Rorie's suit was dismissed for want of prosecution by the District Court on July 12, 1966. This judgment was reversed by the Court of Civil Appeals for the First Supreme Judicial District of Texas, and the case remanded to the District Court for trial on the merits. See: Rorie v. Avenue Shipping Co., Ltd., 414 S.W.2d 948, ref., n.r.e.

After remand the case proceeded to trial before a jury in 1968. The jury's verdict found the City's employee at fault for Rorie's damages and granted Rorie recovery of damages in the sum of $75,000 from the City. It exonerated the shipowner from any liability to Rorie for unseaworthiness or negligence. It further exonerated Strachan from any liability on the cross-actions of the City and the shipowner.

The trial court granted the motion of the City for judgment notwithstanding the verdict and entered a final judgment that Rorie take nothing from the defendants below, the City and the shipowners, and that the shipowner recover from Strachan the sum of $7,500.00 for attorney's fees and disbursements incurred in the successful defense of Rorie's suit. All other relief was denied.

With the exception of the City, all parties have appealed.

It is to be noted that judgment in the instant case was signed and entered on August 26, 1968, and that two days thereafter a letter was sent to the official court

reporter of the trial court requesting preparation of the statements of facts. By affidavit of the court reporter it appears that such work was not even begun until September 15, 1969, over twelve months after trial. The statement of facts was filed in the Court on January 6, 1970, over a year and four months following the initial request therefor. During this period this Court has been presented with no less than eight sworn motions by the court reporter requesting extensions of time. Such delay on the part of the court reporter (solely responsible to the judge of the trial court) is a major reason that this case comes before this Court for determination almost ten years after the date of the accident.

The SS Armagh, a deep-sea cargo vessel on board which the the appellant, C. V. Rorie, Jr., was injured, was docked in the Port of Galveston for the purpose of discharging a cargo of bulk ore. Strachan, a stevedoring company with offices in Galveston, was engaged by the shipowner to provide the necessary longshoremen and equipment to discharge the Armagh's cargo.

To discharge the bulk ore, Strachan arranged for the use of a land-based mobile railway crane sometimes hereafter referred to as the Brown Hoist crane, which was owned by the City. The Brown Hoist crane operated on railroad tracks on the wharf adjacent to the pier where the SS Armagh was moored. The evidence is undisputed that the City furnished the Brown Hoist crane, its operator, Frank McPeters, and a helper, Herman Ermis. McPeters, the operator of the Brown Hoist crane at the time of the accident, was shown to be deceased at the time of trial. A supervisor employed by the City, Johnnie Johnston, was also present on the wharf.

The five longshoremen in Rorie's gang were discharging a cargo of ore from the ship. Rorie was assigned to work in the hold. W. L. Patterson was the signalman. Herman Weber, the gang foreman who died prior to commencement of this trial, operated the ship's winch. The remaining two longshoremen were assigned to work on the rail cars on the dock.

At the time of the accident ore was being discharged from the lower hold of the No. 5 hatch. Running lengthway with the ship down the center of this particular hold was a stanchion or metal structure about four feet wide and seven feet high. This structure extended from the engine room to the stern of the ship to cover the vessel's propeller shaft.

In normal procedure the ore was scooped out of the ship's hold by a clamshell bucket attached by cables to the Brown Hoist crane and emptied into rail cars positioned on the track on the pier adjacent to the ship. After emptying, the operator of the Brown Hoist crane would swing the empty clamshell bucket back over the ship's open hatchway and upon receipt of a signal from the flagman, Patterson, would lower it onto the hold alongside the stanchion which protects the propellor shaft. On the flagman's signal the operator of the Brown Hoist crane would stop the clamshell bucket about one to two feet above the deck. The Brown Hoist crane operator would then, again on the flagman's signal, move the clamshell bucket to the nearest permissible proximity of the ore to be scooped up.

To drag the clamshell bucket under the overhead deck to the ore piled against the side of the ship a cable had

been rigged from the ship's winch through two blocks. These blocks were positioned so that the clamshell bucket, after it had been stopped above the deck in the hatchway, could be pulled into position by use of the cable attached to the ship's winch. Rorie, who was working on the top of the ore in the lower hold, would take a hook attached to the end of the cable which ran from the ship's winch and carry it to the edge of the hatchway and attach it to the clamshell bucket. Then, upon a signal from the signalman, Patterson, the operator of the ship's winch would pull the clamshell bucket back into the wing of the hold and on top of the cargo. The bucket would then, again on signal from the signalman, be opened by the operator of the Brown Hoist crane and dropped on the ore. The hook attached to the cable from the ship's winch would next be detached from the clamshell bucket by Rorie. The operator of the shore-based Brown Hoist crane would then on signal from Patterson pull the clamshell bucket toward the center of the vessel, into the hatchway, and this movement of the open bucket would fill it as it moved through the ore. Finally, after the clamshell bucket had cleared and reached the open hatchway, the Brown Hoist crane operator would, on signal from the signalman, hoist the bucket out of the hold and empty the ore into the railway car on the dock.

The record indicates that immediately prior to Rorie's injury the Brown Hoist crane operator swung the clamshell bucket over the main deck hatchway of the No. 5 hold, and in response to Patterson's signal, the clamshell bucket was being lowered into the hold. There are two versions of what next transpired. Patterson, the signalman, testified that the clamshell bucket was lowered completely

into the lower hold and was stopped in its usual position two or three feet above the deck. Then without any signal on his part, the bucket suddenly and rapidly swung backward toward the stern of the ship and then forward where it hit the stanchion ladder and the stanchion in the middle of the hold, then ricocheted and hit the cargo ore, then ricocheted again hitting and pinning Rorie under it. This version of the accident is at variance with that testified to by Rorie, the plaintiff. It was Rorie's testimony that he was back in the wing of the hold looking in the direction the clamshell bucket was to descend. He testified the first thing he saw was "the bucket hit the ladder and upright center-line stanchion just below the 'tween-deck, and fire just flew." The plaintiff's testimony was quite clear that the clamshell bucket had not fully descended into the lower hold where he was stationed and that if it had he would have seen it. Rorie proceeded to testify that it was while the clamshell bucket was being lowered down into the hold that it struck the stanchion ladder and ricocheted on to him causing his injuries. According to Rorie's testimony this occurred suddenly and unexpectedly. Under either version it appears that at the time Rorie was injured neither the cable from the ship's winch nor any other ship's equipment was attached to the clamshell bucket or in any manner involved in the accident. It further appears that at the time the clamshell bucket hit Rorie he was climbing on a sweat batten (a timber which protects the metal skin of the ship) trying to get out of the way. It does not appear to be disputed but that the operation of the Brown Hoist crane caused serious and permanent injuries to Rorie.

The jury found that McPeters, the Brown Hoist crane operator, struck the clamshell bucket against the ladder in the No. 5 lower hold (special issue no. 11), that such act was negligence (special issue no. 12), and a proximate cause of Rorie's injuries (special issue no. 13). The jury also found that the stevedoring company, Strachan, did not have the right to direct and control McPeters in the operation of the Brown Hoist crane (special issue no. 18) and that McPeters, the operator of the Brown Hoist crane, was not a loaned employee of Strachan (special issue no. 25). In rendering judgment non obstante veredicto for the City, the trial court disregarded the jury's answers to special issues nos. 18 and 25.

[1, 2] A trial court may not disregard the jury's findings of fact and enter judgment non obstante veredicto unless there is no evidence of probative value upon which the jury could have relied in making its determination of fact. In considering such a motion all testimony must be considered in the light most favorable to the party against whom the motion is sought and every reasonable intendment deducible from the evidence is to be indulged in such party's favor. Leyva v. Pacheco, 163 Tex. 638, 358 S.W. 2d 547, 550 (Sup. Ct. 1962); Lynch v. Ricketts, 158 Tex. 487, 314 S.W.2d 273, 276 (Sup. Ct. 1958); Burt v. Lochausen, 151 Tex. 289, 249 S.W.2d 194, 199 (Sup. Ct. 1952).

[3] There is no dispute that McPeters, the operator of the Brown Hoist crane, was a general employee of the City of Galveston. In addition, McPeters had been in the City's employ for many years and was trained by the City for this particular work. The City paid McPeters' salary and deducted from it retirement contributions, and in-

come taxes. The City provided McPeters pension and welfare benefits. The City had employed McPeters initially and had the sole right to discharge him. A witness called by the City and familiar with the practice testified that he had never seen a longshoreman operate a City crane and that he would not let a longshoreman operate one. Neither McPeters nor any other crane operator would subject himself to the control of a stevedoring company in the operation of the City's cranes. The City's crane was an expensive and complicated piece of machinery which could not be repaired by anyone other than the City. The crane's value was estimated at between $75,000 and $100,000. We believe the record to be clear that any use of the City's crane could only be with the operator furnished by the City and that the user had no right to control the City's operator in the operation of the crane.

Despite the record of these facts and findings of the jury (special issues 18 and 25), the trial court granted the City's motion for judgment non obstante veredicto. Apparently, and the City so contends, the trial court granted the motion for judgment non obstante veredicto on the basis of a "tariff" promulgated by the City, and which provided in No. 4-B, item 97, as follows:

> "It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease."

It is the City's position that the foregoing provision in the tariff is determinative of the loaned servant question.

[4] We hold that the jury's answers were fully supported by the evidence and that the judgment non obstante veredicto was erroneously entered. See Insurors Indemnity & Insurance Co. v. Pridgen, 223 S.W.2d 217 (Sup. Ct. 1949); Goodwin v. Wilhelm Steel Const. Co., Tex. Civ. App., 311 S.W.2d 510, ert. ref.; Polanco v. Austin Bridge Co., Tex. Civ. App., 348 S.W.2d 728, no writ hist. A general employee of one person will not become the loaned servant of another where the evidence shows the right of control was in fact retained by the general employer. Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (Sup. Ct. 1949); Halliburton Oil Well Cementing Co. v. Paulk, 180 F.2d 79 (5th Cir. 1950).

[5] We further conclude that the tariff in question does not avail the City. Title 46, U.S.C.A., Sec. 814 et seq., (the shipping act) provides, "All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board. * * *" There is no evidence in the instant record that the tariff was approved by the Federal Maritime Commission upon which it necessarily depended for viability. Port of Tacoma v. S. S. Duval, 9 Cir., 364 F.2d 615; Greater Baton Rogue Port Commission v. United States, 287 F.2d 86 (5th Cir. 1961); Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968). The record gives no indication that the tariff was agreed to by the parties or that it was ever received by Strachan. Absent, therefore, the required approval by the Maritime Commission the tariff appears to be no more than a unilateral declaration of the City. Appellant's points of error relating to the trial court's granting the motion for judgment non obstante veredicto are sustained.

The City of Galveston submits cross-points of error contending that the cause should be remanded rather than rendered if the trial court's judgment is not affirmed. The first two cross-points contend that special issues nos. 12 and 13 were global and that the court should have submitted special issues of negligence. The pertinent special issues and the answers thereto are as follows:

"SPECIAL ISSUE NO. 11

"Do you find from a preponderance of the evidence that, at the time and on the occasion made the basis of this suit, in the operation of the Brown hoist No. 8, the operator of said hoist struck the clam-bucket attached to such hoist against the ladder in the lower hold of No. 5 hatch?

"Answer 'We do' or 'We do not.'

"Answer: We do

"If you have answered Special Issue No. 11 'We do,' and only in that event, then answer:

"SPECIAL ISSUE NO. 12

"Do you find from a preponderance of the evidence that the operator of the Brown hoist No. 8, in striking the clam-bucket attached to such hoist against the ladder in the lower hold of No. 5 hatch, failed to exercise ordinary care in the operation of said hoist?

"Answer 'We do' or 'We do not.'

"By the term 'ordinary care,' as used in this charge, is meant that degree of care that an ordinarily prudent person would use under the same or similar circumstances."

"Answer: We do.

"If you have answered Special Issue No. 12 'We do,' and only in that event, then answer:

"SPECIAL ISSUE NO. 13

"Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of Plaintiff's injuries?

"Answer 'We do' or 'We do not.'

"Answer: We do"

Timely and proper objection was made by the City (to special issue no. 12 and 13) on the grounds that they amounted to a global submission and because they constituted a general charge rather than an inquiry on specific acts of negligence. The City contends that specific issues of negligence must be submitted to and passed upon favorably by the jury in order to sustain a judgment, citing Kainer v. Walker, 377 S.W.2d 613 (Sup. Ct. 1964); Roosth & Genecov Production Co. v. White, 152 Tex. 619, 262 S.W.2d 99 (Sup. Ct. 1953); Driver v. Worth Construction Co., 154 Tex. 66, 273 S.W.2d 603 (Sup. Ct. 1954); Barclay v. C. C. Pitts Sand & Gravel Co., 387 S.W.2d 644 (Sup. Ct. 1965); Jack Cane Corporation v. Gonzales, Tex. Civ. App., 410 S.W.2d 953, no writ hist.; Simmons Motor Co. v. Mosley, Tex. Civ. App., 379 S.W.2d 711, ref., n.r.e.; Louisiana & Arkansas Ry. Co. v. Carpenter, Tex. Civ. App., 402 S.W.2d 198; Thomas v. Shut, Tex. Civ. App., 448 S.W.2d 536; and LeBlanc, Inc. v. Gulf Bitulithic Co., Tex. Civ. App., 412 S.W.2d 86, ref., n.r.e.

[6] In response, the plaintiff makes what will be considered alternative contentions. First, plaintiff contends it was undisputed that the operator of the Brown Hoist crane

had the exclusive control of the operation of the hoist so that the res ipsa loquitur doctrine is applicable. We cannot agree. As we view the instant record "exclusive control" on the part of the operator (McPeters) was indeed disputed throughout the entire record. We believe it to be apparent that at the time and on the occasion in question McPeters' operation of the Brown Hoist crane was dependent upon signals being given by the signalman, Patterson, who was an employee of Strachan. McPeters was at the controls of the Brown Hoist crane but was positioned so that he could not see down into the hold of the ship, could not see the stanchion ladder or the stanchion, and could not see Rorie. By virtue of the operator's inability to see into the hold the use of a signalman was essential to the Brown Hoist crane's operation of the clamshell bucket. The clamshell bucket was made of iron, was estimated to weigh in the neighborhood of four thousand pounds, was moved a considerable distance both vertically and horizontally, and was used in a reasonably close proximity to the various individuals heretofore indicated. We believed it to be inescapable that no operation or movement of the clamshell bucket would be made where the operator of the Brown Hoist crane could not observe its position or had the assistance of a signalman so as to be enabled to determine its position. A part of the signalman's responsibility was to see that the man in the hold was safely positioned in relation to the movement of the bucket. It is apparent that assistance in the form of signals and directions from the signalman, Patterson, were indispensible to the operation of the Brown Hoist crane when it was in the hold or was descending into the hold. This being true we must conclude that no exclusive control by McPeters, the Brown Hoist crane operator, is

indicated in this record. This is true under either version of how the accident occurred.

[7] Such record is dissimilar from that in Bond v. Otis Elevator Co., 388 S.W.2d 681 (Sup. Ct. 1965), relied upon by the plaintiff. Aside from the patent factual dissimilarity the instant case contains no jury finding of exclusive control. In Bond, supra, the jury found exclusive control in one of the defendants, Adolphus Tower Building. (Court of Civil Appeals opinion, Otis Elevator Co. v. Bond, 373 S.W.2d 518). The Supreme Court stated, "* * * the evidence *shows conclusively* that Otis was in control of the elevator jointly with (a co-defendant) Adolphus Tower. * * *" (Emphasis added). Bond v. Otis Elevator Co., supra, at p. 686. For the doctrine to be invoked it must be shown that the instrumentality by which the harm was occasioned was in the exclusive control of the defendant. As our Supreme Court has recently stated, "As a matter of law, this is not a *res ipsa loquitur* case. The record shows conclusively that the instrumentality causing the harm was not under the *exclusive control* of Brown or his employer Hughes." (2nd emphasis added). Owen v. Brown, 447 S.W.2d 883, 886 (Sup. Ct. 1969). See also City of San Antonio v. Esquivel, 163 Tex. 222, 353 S.W.2d 410 (Sup. Ct. 1962); Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (Sup. Ct. 1944).

[8] In what is considered an alternative contention the plaintiff asserts that the issues are sufficiently specific and do not constitute a global submission. Special issue No. 11 inquired whether or not the operator of the Brown Hoist crane struck the clamshell bucket against the ladder in the hold. An affirmative answer to this issue *does* appear to have been conclusively established in the record.

Special issues 12 and 13, however, inquire, whether or not the operator failed to exercise ordinary care, and contingently, if such failure was a proximate cause of plaintiff's injuries. It is first to be noted that five specific acts of negligence on the part of the City were pled by the plaintiff; such specific pleading preceding the plaintiff's pleading on the basis of res ipsa loquitur. It is again also noted that timely and proper objections to these last two special issues were urged by the City. The possible alternative which might arise in the absence of proper and timely objection suggested by Justice Walker in Barclay v. C. C. Pitts Sand & Gravel Co., supra, do not exist here. The instant case is one on which reliance is placed on an "ordinary care" issue devoid of any such assistance and standing on the fact situation described. "It is nevertheless well settled that as a general rule and when the question is properly raised, special issues relating to either primary or contributory negligence should be restricted to specific acts and omissions which have been raised by the pleadings and evidence." Barclay v. C. C. Pitts Sand & Gravel Co., supra, 387 S.W.2d at p. 647. We must conclude that the "proper control" issue condemned in Barclay, supra, and the "ordinary care" issue condemned in Kainer, supra, are no more specific than the issues here used. The City's cross-points of error must be sustained.

By virtue of this determination it is incumbent upon this Court to reverse and remand the instant case to the trial court. This being true we do not reach Strachan's points of error grounded in the trial court's award of recovery to the ship owners of attorneys' fees and disbursements incurred in the defense of plaintiff's suit against the shipowners. Neither do we reach the contention of plaintiff's counsel that a reasonable attorney's fee should be

awarded him out of the reimbursement awarded by the trial court to Texas Employers Insurance Association, intervenors herein, for the medical expenses and compensation insurance benefits paid to plaintiff.

[9] In view of the disposition here made of the instant case, it is to be noted that the City in cross-points of error numbers 3, 4 and 5, contends that the trial court should have submitted the City's requested issues as to the alleged negligence of the plaintiff Rorie in failing to position himself safely with respect to the clamshell bucket. The facts evident in the instant record show, however, that the plaintiff had to be within a relatively close proximity of the bucket in order to fulfill his tasks as a workman. Under such circumstances the possibility that Rorie could have stationed himself somewhere in the ship's hold that was further removed from the clamshell bucket does not raise an issue as to negligence on his part in failing to do so. These cross-points of error are overruled.

For the reasons heretofore stated, this case is reversed and remanded.

BARRON, Justice (dissenting).

While I agree with the opinion of the majority generally, I cannot agree that this cause should be reversed and remanded because special issues numbers 12 and 13 are alleged to be global.

I would hold that the above special issues are sufficiently specific under the peculiar facts of this case. I do not consider cases such as Barclay v. C. C. Pitts Sand & Gravel Co., 387 S.W.2d 644, 647 (Tex. Sup.), and similar authority to be here applicable or controlling.

IN THE
DISTRICT COURT OF GALVESTON COUNTY
56th Judicial District of Texas

C. V. RORIE, JR.

v.

AVENUE SHIPPING CO., LTD., ET AL.

NO. 96,190

(Filed August 26, 1968)

JUDGMENT

On the 23rd day of April, 1968, came on to be heard the above entitled and numbered cause, wherein C. V. Rorie, Jr. is plaintiff, Texas Employers' Insurance Association is Intervenor, Avenue Shipping Co., Ltd. and Trinder, Anderson & Company, Ltd., and the Board of Trustees of the Galveston Wharves and the City of Galveston are defendants, and Strachan Shipping Company is cross-defendant, and came the parties by and through their attorneys of record and announced ready for trial, and a jury of twelve (12) jurors were duly drawn, impaneled and sworn in to try said cause, and then said cause proceeded to trial. Whereupon plaintiff introduced his testimony and

rested, and the defendant, Board of Trustees of the Galveston Wharves, having duly filed and presented its Motion for Instructed Verdict, the said Motion was granted and sustained by the Court. Thereafter, defendants, Avenue Shipping Co., Ltd. and Trinder, Anderson & Company, Ltd., rested without presenting any evidence and thereafter the City of Galveston introduced its testimony and rested; and thereafter cross-defendant, Strachan Shipping Company, introduced its evidence and rested, and the jury having heard the pleadings, the evidence, the Charge of Court and argument of counsel, on the 3rd day of May, 1968, retired to consider their verdict, and on the 7th day of May, 1968, returned their verdict in open court in the form of Special Issues and answers thereto, to-wit:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Defendants Avenue Shipping Co., Ltd., and Trinder, Anderson & Co., Ltd., at the time and on the occasion made the basis of this suit, acting by and through their master, mates, agents, servants and employees, failed to provide the Plaintiff with a reasonably safe place in which to work?

To which the jury answered "We do not."

If you have answered Special Issue No. 1 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that such failure, if any, was a cause, in whole or in part, of Plaintiff's injuries?

To which the jury gave no answer.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that Defendants Avenue Shipping Co., Ltd., and Trinder, Anderson & Co., Ltd., at the time and on the occasion made the basis of this suit, acting by and through their master, mates, agents, servants and employees, failed to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances to provide the Plaintiff with a reasonably safe place in which to work?

To which the jury answered "We do not."

If you have answered Special Issue No. 3 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such failure, if any, was a cause, in whole or in part, of Plaintiff's injuries?

To which the jury gave no answer.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that, at the time and on the occasion made the basis of this suit, the failure of Defendants Avenue Shipping Co., Ltd., and Trinder, Anderson & Co., Ltd., to discharge the ore from the forward end of the lower hold of Hatch No. 5 with the use of a bulldozer to move the cargo into the inshore portion of Hatch No. 5 exposed Plaintiff to an unreasonable risk of harm?

To which the jury answered "We do not."

If your have answered Special Issue No. 5 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that such failure, if any, was a cause, in whole or in part, of Plaintiff's injuries?

To which the jury gave no answer.

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that, at the time and on the occasion made the basis of this suit, the failure of Defendants Avenue Shipping Co., Ltd., and Trinder, Anderson & Co., Ltd., to discharge the ore from the forward end of the lower hold of Hatch No. 5 with the use of ore buckets to move the cargo into the inshore portion of the square of the hatch exposed Plaintiff to an unreasonable risk of harm?

To which the jury answered "We do not."

If you have answered Special Issue No. 7 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that such failure, if any, was a cause, in whole or in part, of Plaintiff's injuries?

To which the jury gave no answer.

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that, at the time and on the occasion made the basis of this suit, the failure of Defendants Avenue Shipping Co., Ltd., and Trinder, Anderson & Co., Ltd., to discharge the ore from the forward end of the lower hold of Hatch No. 5 with the use of skids to move the cargo into the inshore portion of Hatch

No. 5 exposed Plaintiff to an unreasonable risk of harm?

To which the jury answered "We do not."

If you have answered Special Issue No. 9 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that such failure, if any, was a cause, in whole or in part, of Plaintiff's injuries?

To which the jury gave no answer.

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that, at the time and on the occasion made the basis of this suit, in the operation of the Brown hoist No. 8, the operator of said hoist struck the clam-bucket attached to such hoist against the ladder in the lower hold of No. 5 hatch?

To which the jury answered "We do."

If you have answered Special Issue No. 11 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that the operator of the Brown hoist No. 8, in striking the clam-bucket attached to such hoist against the ladder in the lower hold of No. 5 hatch, failed to exercise ordinary care in the operation of said hoist?

To which the jury answered "We do."

If you have answered Special Issue No. 12 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that the operator of the Brown hoist No. 8, in strik-

ing the clam-bucket attached to such hoist against the ladder in the lower hold of No. 5 hatch, failed to exercise ordinary care in the operation of said hoist?

To which the jury answered "We do."

If you have answered Special Issue No. 12 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of Plaintiff's injuries?

To which the jury answered "We do."

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, C. V. Rorie failed to keep such a lookout as would have been kept by a person of ordinary prudence, in the exercise of ordinary care, under the same or similar circumstances?

To which the jury answered "We do not."

If you have answered Special Issue No. 14 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 15

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the accident in question?

To which the jury gave no answer.

If you have answered Special Issue No. 15 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 16

By what percentage do you find that such failure,

if any, proximately contributed to the Plaintiff's injuries, if any?

To which the jury gave no answer.

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the acts or omissions of Strachan Shipping Company employees were not the sole proximate cause of the accident in question?

To which the jury answered "They were not the sole proximate cause."

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that, on the occasion in question, Strachan Shipping Company had the right to direct and control Frank McPeters in the operation of the Brown hoist No. 8 on the occasion in question?

To which the jury answered "We do not."

If you have answered Special Issue No. 1 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 19

Do you find from a preponderance of the evidence that such failure, if any, resulted from a failure on the part of Strachan Shipping Company, its agents, servants or employees, to discharge the vessel in a reasonably safe and workmanlike manner?

To which the jury gave no answer.

If you have answered Special Issue No. 3 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence

that such failure, if any, resulted from a failure on the part of Strachan Shipping Company, its agents, servants or employees, to discharge the vessel in a reasonably safe and workmanlike manner?

To which the jury gave no answer.

If you have answered Special Issue No. 5 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 21

Do you find that in discharging the No. 5 lower hold without the use of a bulldozer Strachan Shipping Company, its agents, servants or employees, failed to discharge said vessel in a reasonably safe and workmanlike manner?

To which the jury gave no answer.

If you have answered Special Issue No. 7 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 22

Do you find that in discharging the No. 5 lower hold without the use of ore buckets Strachan Shipping Company, its agents, servants or employees, failed to discharge said vessel in a reasonably safe and workmanlike manner?

To which the jury gave no answer.

If you have answered Special Issue No. 9 "We do," and only in that event, the answer:

SPECIAL ISSUE NO. 23

Do you find that in discharging the No. 5 lower hold without the use of skids Strachan Shipping Company, its agents, servants or employees, failed to discharge said vessel in a reasonably safe and workmanlike manner?

To which the jury gave no answer.

If you have answered Special Issue No. 12 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 24

Do you find from a preponderance of the evidence that such failure, if any, was not the sole proximate cause of the Plaintiff's injuries, if any?

To which the jury answered "It was not the sole proximate cause."

SPECIAL ISSUE NO. 25

Do you find from a preponderance of the evidence that on the occasion in question the operator of Brown hoist No. 8 was not a loaned employee of Strachan Shipping Company?

To which the jury answered "He was not a loaned employee."

SPECIAL ISSUE NO. 26

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and adequately compensate Plaintiff C. V. Rorie for the injuries sustained by him on September 6, 1960, or will in reasonable probability be caused in the future, as a direct and proximate result of occasion in question, taking into consideration the following elements of damage and none others:

a. Such sum of money, if any, as will reasonably compensate Plaintiff for his loss of wages from September 6, 1960, until the present time;

b. Such sum of money, if any, as will reasonably compensate Plaintiff for his loss of wage-earning capacity, if any, which he would, in reason-

able probability, sustain in the future beyond this date;

c. Such sum of money, if any, as will reasonably compensate Plaintiff for the physical pain, if any, suffered by him from September 6, 1960, until the present time;

d. Such sum of money, if any, as will reasonably compensate Plaintiff for the physical pain, if any, he will, in reasonable probability, sustain in the future beyond this date;

e. Such sum of money, if any, as will reasonably compensate Plaintiff for the mental anguish humiliation suffered by him, if any, from September 6, 1960, until the present time;

f. Such sum of money, if any, as will reasonably compensate Plaintiff for the mental anguish and humiliation, if any, which he will, in reasonable probability, suffer from the present time into the future?

To which the jury answered "$75,000.00."

And the Court having duly received said verdict and having ordered the same filed, thereafter the plaintiff and intervenor filed a motion for judgment and the defendant, City of Galveston, filed its Motion for Judgment Non Obstante Veredicto and to Disregard Certain Special Issues, and the Court being of the opinion that the motion of plaintiff and intervenor should be overruled and that the Motion of the City of Galveston should be granted;

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that plaintiff and intervenor take nothing against the defendants, Avenue Shipping Co., Ltd., Trinder, Anderson & Company, Ltd., the Board of Trustees of the Galveston Wharves, and the City of Gal-

veston, and such defendants go hence without day and with their costs.

And the Court further finding that defendants, Avenue Shipping Co., Ltd., and Trinder, Anderson & Company, Ltd., are entitled to recover against cross-defendant, Strachan Shipping Company, for attorneys' fees, investigation, expenses and miscellaneous costs, incurred in defense of the plaintiff's suit, and, all parties agreeing that the Court may fix the reasonable amount of such cost, the Court finds that the reasonable cost thereof was $7,500.00, and that such amount was and is reasonable in the circumstances.

It is, therefore, ORDERED, ADJUDGED and DECREED that defendants, Avenue Shipping Co., Ltd., and Trinder, Anderson & Company, Ltd., recover against Strachan Shipping Company the sum of $7,500.00, together with interest thereon from the date of this Judgment.

All other relief not herein specifically granted is in all things denied. All facts not found by the jury are here and now found by the Court in support of this Judgment.

To all of which action of the Court the plaintiff, the intervenor, defendants Avenue Shipping Co., Ltd., and Trinder, Anderson & Company, Ltd., and cross-defendant Strachan Shipping Company in open Court duly excepted and gave notice of appeal to the First Court of Civil Appeals in Houston, Texas.

SIGNED and ENTERED this 26th day of August, 1968.

W. E. STONE
Judge

THE STATE OF TEXAS,)
COUNTY OF GALVESTON.)

I, V. J. BENINATI, JR., Clerk of the District Court in and for the County of Galveston, do hereby certify that the foregoing is a true and correct copy of a certain judgment and decree rendered by the District Court for the 56th Judicial District in and for Galveston County, Texas, on the 26th day of August, A.D. 1968 in Cause No. 96,190 entitled C. V. Rorie, Jr., Plaintiff, and Avenue Shipping Co., Ltd. et al, Defendant, and entered on the minutes of said Court on pages 233-241 of Book No. 122 as appears of record manifest in my office.

Witness, my official signature and seal of the said District Court at office in Galveston, Texas, this the 30th day of August, 1968.

V. J. BENINATI, JR.,
Clerk District Court, Galveston
County, Texas.

By ELIZABETH A. CROSBY,
Deputy Clerk.

(Seal)

THE

Supreme Court of Texas

Capitol Station

AUSTIN, TEXAS

78711

July 28, 1971

Mr. Robert Eikel, Attorney
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P. O. Box 629
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Re: C. V. Rorie, Jr. et al. vs.
City of Galveston
Supreme Court No. B-2326.

Gentlemen:

Enclosed you will find a copy of the judgment of our Court in the above numbered and entitled cause as it appears in the minutes of our Court.

Yours very truly,

GARSON R. JACKSON, Clerk

EUGENE CERVENKA

By Eugene Cervenka, Deputy.

No. B-2326

C. V. Rorie, Jr. et al.

vs.

City of Galveston

From Galveston County, Fourteenth District.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justices Denton and Daniel not sitting) that there was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is, therefore, *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the District Court be, and hereby is, affirmed.

It is further ordered that petitioner, C. V. Rorie, Jr., and his surety, Fidelity and Deposit Company of Maryland, and petitioner, Texas Employers Insurance Association, and its surety, Employers Casualty Company, pay three-fourths (3/4ths) of the costs expended and incurred in this Court and Court of Appeals, jointly and severally; that petitioner, Strachan Shipping Company, and its surety, Employers' Casualty Company, pay one-fourth (1/4th) of the costs expended and incurred in this Court and Court of Civil Appeals, and that this decision be certified to the District Court of Galveston County, Texas, for observance.

(Opinion of the Court by Ruel C. Walker, Associate Justice.)

Clerk, Supreme Court of Texas
Box J, Capitol Station
Austin, Texas 78711

Messrs. Fulbright, Crooker and Jaworski, Attorneys
Bank of the Southwest Building
Houston, Texas 77002

Attn: Messrs. Dixie Smith &
Theodore Goller

CLERK'S OFFICE - SUPREME COURT
Austin, Texas, Oct. 13, 1971

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of RORIE ET AL. v. CITY OF GALVESTON, No. B-2326, was this day overruled.
(Both motions)

Very truly yours,

GARSON R. JACKSON, Clerk

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

UNITED STATES CONSTITUTION, AMEND. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C.A. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

46 U.S.C.A. § 801. Definitions

When used in this chapter:

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

46 U.S.C.A. § 814. Contracts between carriers filed with Board

Every other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy of every agreement, with another such other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board; and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

46 U.S.C.A. § 816. Discriminatory rates prohibited; supervision by Board

Every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

46 C.F.R. § 533. Filing of Tariffs by Terminal Operators

§ 533.1 Scope

This part sets forth rules and regulations for the filing of terminal tariffs by persons engaged in carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities . . . in connection with a common carrier by water in the foreign commerce of the United States . . .

§533.3 Persons who must file

Every person . . . carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in § 533.1, including, but not limited to terminals owned or operated by States and their political subdivisions . . . shall file in duplicate with the Bureau of Domestic Regulation, Federal Maritime Commission, and shall keep open to public inspection at all its places of business a schedule or tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities . . .

§ 533.6 Definitions

(d) Definitions of terminal services:

. . .

(10) Heavy lift: The service of providing heavy lift cranes and equipment for lifting cargo.

PLEADINGS

NO. 96,190

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS — 56th JUDICIAL DISTRICT

C. V. RORIE, JR.
v.
AVENUE SHIPPING CO., LTD., ET AL

PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION

To The Honorable Judge Of Said Court:

COMES NOW C. V. RORIE, JR., hereinafter called Plaintiff, complaining of AVENUE SHIPPING CO., LTD.; TRINDER, ANDERSON & COMPANY, LTD.; and the CITY OF GALVESTON, its Mayor, HERBERT Y. CARTWRIGHT, and its Board of Trustees of the Galveston Wharves, hereinafter called Defendants, and with leave of Court first had and obtained, files this his Fourth Amended Original Petition, alleging as follows:

I.

Defendant, Avenue Shipping Co., Ltd., is a foreign corporation, organized and existing by virtue of law, but doing business in the State of Texas, and being engaged in interstate commerce. Defendant, Trinder, Anderson & Company, Ltd., is a foreign corporation, organized and existing by virtue of law, but doing business in the State of Texas, and being engaged in interstate commerce. Defendant, Avenue Shipping Company, Ltd., is the owner

and/or operator of, and Defendant, Trinder, Anderson & Company, Ltd., is the manager for said shipping company, of a fleet of vessels having regular routes from ports of the United States and foreign countries to ports in the State of Texas and particularly Galveston County, Texas, one of such vessels being the SS ARMAGH. On such regular trips the various vessels of the Defendants come into Texas ports, including the ports of Galveston County, Texas, and bring in and/or take out cargoes of various kinds. Said Defendants have an agent, to-wit: Strachan Shipping Company, U. S. National Bank Building, Galveston, Texas, where service of process may be had upon them in this cause.

The Defendant City of Galveston is a municipal corporation organized and existing under and by virtue of the laws of the State of Texas. In its proprietary capacity, the City of Galveston owns and operates the Galveston Wharves, through a Board of Trustees composed of certain elected and/or appointed persons and/or their successors in office, all of whom may be served with citation at the office of said Board of Trustees of Galveston Wharves at 25th Street and Avenue I, Galveston, Texas. Said Defendant, City of Galveston, has a duly elected, qualified and acting Mayor-President, Herbert Y. Cartwright, upon whom service may be had in this cause.

II.

On or about September 6, 1960, Defendant City of Galveston in its proprietary capacity of owner and/or operator of the Galveston Wharves, through the above alleged Board of Trustees and/or their successors in office, was engaged in the business or function of owning, leasing, renting and/or operating shore-cranes and other

similar or related rigging equipment or machinery, and said Defendant had agents, servants and/or employees on its payroll for the purpose of operating said shore-cranes and said rigging equipment for profit in connection with loading and unloading ships in the area of the Galveston Wharves.

III.

On or about the 6th day of September, 1960, Plaintiff C. V. RORIE, JR., was employed as a longshoreman by Strachan Shipping Company, the contract stevedore, to discharge cargo from the SS ARMAGH, owned and operated by the Defendants; that at all times material hereto the Defendants, and each of them, as owners and operators of the SS ARMAGH, were duty bound to supply Plaintiff, and all others similarly situated, with tools, machinery and equipment to permit him to perform his work of discharging the cargo from the holds of its vessel with safety. In connection therewith Plaintiff would show that Defendants had actual, as well as constructive, notice that ore bulk cargo was to be discharged from Hatch Number 5 of their vessel, by means of a shore based crane and placed into gondola cars stationed on the wharf alongside the Number 5 hatch. Plaintiff would show that at the time and on the occasion in question a substantial portion of the ore was stowed underneath the wings in the lower hold of the hatch, and that it could not be picked up by the clam bucket of the crane in a routine manner. Defendants were negligent in failing to provide a safe method of bringing the ore that was stowed in the wings of the hatch into the square of the hatch by means of equipment such as bulldozers and/or payloaders or other suitable equipment such as ore buckets or skids or slips,

where the steel bucket attached to the shore based crane could pick up the said cargo with safety to all those working in that area; Defendants, by and through their agents, servants and employees, were derelict in their absolute and non-delegable duty to supply tools and machinery to permit the safe moving of said cargo into the square of the hatch and failed to discharge their non-delegable duty, absolute in its nature, to supply Plaintiff with a safe place to work. The Defendants used or permitted to be used a scheme of employing the ship's winches and a snatch block to pull and/or bring the heavy steel bucket from the square of the hatch to the wings for the purpose of discharging the cargo.

Plaintiff further alleges that the method used in the discharge of the said cargo was dangerous to all those working in that area and particularly the Plaintiff herein, and constituted negligence of which the Defendants, and each of them, acting by and through their agents, servants and employees, had knowledge or by the exercise of reasonable diligence should have had knowledge thereof,

Plaintiff would show your Honorable Court that on or about the 6th day of September, 1960, while Plaintiff was working in the lower hold of hatch number 5 in connection with the discharge of the cargo of ore, and because of the failure of the Defendants, and each of them, their agents, servants and employees, to supply tools and equipment with which to discharge the cargo with safety, your Plaintiff sustained serious injuries when the steel bucket struck a bulkhead and ricocheted into him while it was being swung toward the wings of the hatch from the center of the hatch.

IV.

Plaintiff would show that the injuries sustained by him on or about the 6th day of September, 1960, were caused and contributed to be caused by the negligence of the Defendants, Avenue Shipping Company, Ltd., and Trinder, Anderson & Company, Ltd., and each of them, their master, officers, agents, servants and employees, and/or the failure to supply proper tools and equipment so as to permit Plaintiff to discharge his duty with safety, i.e., seaworthy appliances, and the improper and unsafe manner in which the ore was being discharged, in the following particulars, among others, to-wit:

(1) In failing to supply Plaintiff with a safe place in which to work.

(2) In failing to supply ore buckets, slips and/or skids to be used to bring the cargo of ore into the square of the hatch.

(3) In failing to supply a bulldozer or payloader to be lowered into the lower hold of hatch number 5 with which to move the cargo of ore into the square of the hatch.

(4) In permitting the discharge of the cargo of ore from the lower hold of hatch number 5 without the use of bulldozers or payloaders and/or suitable equipment and tools, such as slips, skids and/or ore buckets, to bring in or move the cargo into the square of the hatch.

(5) In failing to exercise that degree of care which would have been exercised by persons of ordinary prudence under the same or similar circumstances to determine that the discharge operation was conducted with proper tools and equipment.

(6) Plaintiff would show that the Defendants, acting by and through their master, officers, agents and/or employees knew, or by the exercise of ordinary diligence should have known that the discharge operation conducted at the time and on the occasion made the basis of this suit was not carried on in a safe manner and/or with proper tools and equipment so as to protect Plaintiff from unreasonable risk of harm, and that such failure constituted negligence.

(7) In negligently permitting the discharge of a cargo from underneath the wings of the forward portion of the lower hold of Hatch Number 5 without the use of ore buckets, bulldozers or payloaders, slips or skids.

(8) In negligently permitting the discharge of the cargo from underneath the wings of the forward portion of the lower hold of Hatch Number 5 by using the clam bucket and snatch block attachment.

(9) In negligently permitting the discharge of a cargo from underneath the wings of the forward portion of the lower hold of Hatch Number 5 without first bringing and/or moving said cargo into the inshore portion of the square of Hatch Number 5.

Plaintiff states that each and all of the foregoing facts, conditions, circumstances and acts of omission, as well as commission, constituted negligence on the part of the said Defendants, its or their agents, servants and employees, and the failure to use ordinary care, and each and all, taken singularly and in conjunction with each other, proximately caused and contributed to cause, in whole or in part, Plaintiff's injuries and resulting complications, disabilities and damages of which he herein complains.

V.

Plaintiff would further show that the SS ARMAGH was unseaworthy in that the Defendants breached their absolute and non-delegable duty to provide tools and equipment that would permit Plaintiff to discharge his duties in safety and/or to provide tools and equipment so as to protect him and all others similarly situated from unreasonable risk of harm.

In connection therewith Plaintiff would show that the Defendants had an absolute and non-delegable duty to supply tools and equipment as to permit the work to be done with reasonable safety to him and to protect him from unreasonable risk of harm. That the failure of the Defendants, their agents, servants and employees, to supply a crane free of defects and in proper working condition and/or to supply either a bulldozer, payloader and/or other equipment, such as ore buckets, slips and/or skids for moving the cargo to the square of the hatch where the bucket attached to the shore based crane could lift the same, rendered the vessel unseaworthy, by reason of which Plaintiff suffered the injuries hereinafter more fully set out.

VI.

Plaintiff would further show that the Defendant, City of Galveston, acting by and through its servants, agents and employees, for a valuable consideration agreed to and did lease the crane and an operator to operate said crane in connection with the discharge of ore cargo from the Number 5 hatch of the SS ARMAGH. That said Defendant, acting by and through its said operator, was negligent in the operation of such crane causing Plaintiff's injuries in the following respects:

(1) In negligently swinging the bucket attached to said crane so that it would strike portions of the steel structure of the hatch of said vessel which in turn ricocheted wildly in said hatch, striking Plaintiff.

(2) In operating said crane without first receiving a signal from the signal man.

(3) In negligently operating and/or swinging the clam bucket attached to said crane so that it would strike portions of the steel structure of said hatch.

(4) In negligently operating the crane so as to cause the clam bucket to strike the steel structure of Hatch Number 5.

(5) In moving the clam bucket without a signal from the signal man.

Plaintiff states that each and all of the foregoing facts, conditions, circumstances and acts of omission, as well as commission, constituted negligence on the part of the said Defendant, its agents, servants and employees, and all and each, taken singularly or in conjunction with each other, proximately caused, or contributed to be caused, in whole or in part, Plaintiff's injuries and resulting complications, disabilities and damages of which he herein complains.

VII.

In the alternative, and in the event Plaintiff is mistaken in any or all of the acts of negligence against the Defendant, City of Galveston, or the exact cause which brought about the movement of the clam bucket so as to strike Plaintiff, then Plaintiff alleges that the actual control and operation of said crane at the time and on the occasion in question was under the Defendant, its agents, servants

and employees other than Plaintiff. Plaintiff, as a member of the longshore gang in the lower hold of Hatch No. 5, was not in a position to know how said crane was operated at the time and on the occasion made the basis of this suit, and what caused the said clam bucket to move suddenly without a signal with such force so as to strike the steel structure of the lower hold of Hatch No. 5 and swing so as to strike Plaintiff. That Defendant, City of Galveston, through its agents, servants and/or employees knew, or in the exercise of ordinary care at the time and on the occasion in question should have known and could have known of the condition of said crane and the method and manner of its operation. Such facts are exclusively within the knowledge of the Defendant, its agents, servants and employees, or in the exercise of ordinary care they should have known of the same, but the Plaintiff does not know, nor was he in a position to know, the condition of the said crane or its method and manner of operation, the condition of its brakes, lever or whatever method there is in operating said crane in order that it may operate in a proper fashion without striking the steel structure of Hatch No. 5 and/or Plaintiff or others similarly situated. In any event, Plaintiff alleges that he does not know and is not in a position to know the exact cause of said bucket swinging with such force against the steel structure of the lower hold of Hatch No. 5 and its subsequent movement so as to strike Plaintiff, injuring him; and Plaintiff alleges that such a condition does not ordinarily take place, and that if the Defendant and those operating said crane would have exercised ordinary care in the operation and maintenance of said crane, the clam bucket and its attachments, or make timely and proper inspection of same, the sudden swinging of said clam bucket would

not have taken place; that there is no other cause for the sudden swinging and striking of said clam bucket against the steel structure of said hatch except that the condition of said clam bucket, its attachments, brakes, levers were defective and/or the negligent act or acts or omission of the Defendant, its agents, servants and employees or those acting for them. Because of the peculiar situation surrounding the circumstances of the injuries of Plaintiff, Plaintiff was unable to know, and does not know the exact cause of said sudden swinging movement of said clam-bucket which struck and injured him. Therefore, Plaintiff puts the Defendant, City of Galveston, on notice that he does not rely exclusively on the allegations of negligence, or the acts of negligence hereinabove alleged, but in the alternative, relies on the doctrine of *res ipsa loquitur*, i.e., that the circumstances under which Plaintiff was injured speak for themselves as a grounds for recovery herein.

VIII.

Plaintiff would show that by reason of the injuries above alleged, he has suffered serious and painful injuries to his body, consisting of, among other things, a compound fracture of the lower left femur of the left leg, injuring the bones, ligaments, tendons, cartilages, etc., of his left leg; that by reason of such injuries he has been hospitalized a number of times and has undergone operations on at least three different occasions. That he has suffered injury to his back and in any event, the injuries sustained as above alleged caused deformities of his body, instability of his back, impairment of his circulatory system and other serious and painful injuries, as a result of which

he was unable o work from the date of his injuries to the date of the filing of this amended petition and will be unable to work for the rest of his life.

That by reason of the injuries above alleged, Plaintiff suffered, suffers and will continue to suffer extreme pain and mental anguish and will suffer pain, mental anguish and humiliation for the rest of his life. Plaintiff would show that at the time of his injuries he was a young, robust, strong man, 40 years of age with a life expectancy of 35 years; that by reason of the injuries sustained as above alleged he will no longer be able to work and earn money; that his ability to earn a living has been totally impaired and destroyed, all to his damage in the sum of One Hundred Twenty-five Thousand Dollars ($125,000).

IX.

Plaintiff would further show that by reason of the injuries sustained, as above alleged, he has been confined in hospitals incurring expenses for medical care and attention, operations, drugs, etc. That such hospitalization, medical care and attention, hospital bills, operating rooms, anesthesia, medical bills, etc., he had to spend and/or has become obligated to spend to the time of the filing of this amended petition the sum of approximately Four Thousand One Hundred Twenty-one and 96/100 Dollars ($4,121.96).

Plaintiff would show that the medical treatment, hospitalization, physiotherapy treatment and medicines received by him were necessary and the charges made therefor were reasonable and the usual and customary charges made by the medical profession, hospitals, physiotherapists,

drug stores, etc., in Galveston County, Texas. That in all probability he will need further medical care and attention in the future and the reasonable cost thereof will be in the approximate sum of Five Thousand Dollars ($5,000).

WHEREFORE, premises considered, Plaintiff prays that citation issue and be served upon the said Defendants to appear and answer herein, and upon final hearing hereof, Plaintiff prays judgment against said Defendants, and each of them, jointly and severally, for his damages as above alleged in the total amount of One Hundred Thirty-four Thousand One Hundred Twenty-one and 96/100 Dollars ($134,121.96), together with interest thereon from the date of such injuries or from the date of judgment, all costs of Court, and all such other and further relief, whether general or special, at law or in equity, to which Plaintiff may be justly entitled in the premises.

MANDELL & WRIGHT

By ARTHUR J. MANDELL
Attorneys for Plaintiff
707 South Coast Building
Houston, Texas 77002

PLAINTIFF HEREBY REQUESTS TRIAL BY JURY

NO. 96,190

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS — 56th JUDICIAL DISTRICT

C. V. RORIE, JR.

v.

AVENUE SHIPPING CO., LTD., ET AL

DEFENDANT CITY OF GALVESTON'S FIRST AMENDED ANSWER

(Filed June 17, 1966)

TO THE SAID HONORABLE COURT:

COMES NOW City of Galveston, its Mayor, and its Board of Trustees of Galveston Wharves, and file this their First Amended ~~Original~~ Answer to plaintiff's petition on file herein:

I.

Defendants adopt by reference the Plea in Abatement contained in these defendants' original answer.

II.

Defendants specially except to plaintiff's petition and to the portions and for the reasons hereinafter stated:

(1) To the petition as a whole, because it states no cause of action against the Mayor or the Board of Trustees of the Galveston Wharves, and the petition shows on its face that the City of Galveston is the only proper party, insofar as the operation of the Wharves is concerned.

(2) To the allegations in amended page 6 of plaintiff's third amended petition, wherein it is alleged that defend-

ant City of Galveston "negligently failed to operate said crane in a safe manner so that same would not swing", because the same is a conclusion of law and a conclusion of the pleader and is too vague, indefinite and uncertain to apprise the defendant of the proof that it will be required to meet, in that it is not stated in what respect or in what manner the defendant was negligent.

(3) To the allegations in sub-paragraph (2b) of Paragraph VI and amended page 6 of plaintiff's third amended petition, wherein it is alleged that this defendant negligently failed to keep and maintain the crane "in a proper working condition and in breaching its warranty that said crane was in proper working condition", because the same is a conclusion of law and a conclusion of the pleader and is too vague, indefinite and uncertain to apprise the defendant of the proof that it will be required to meet, in that it is not stated in what respect or in what manner the crane was not in a proper working condition and it is not stated in what respect the warranty was breached and it is not stated what the warranty was.

Of each and all of which special exceptions defendants pray judgment of the Court.

III.

Subject to the foregoing, and without waiving the same, these defendants deny each and every, all and singular, the allegations contained in plaintiff's petition and demand strict proof thereof.

IV.

Defendants allege that plaintiff at the time and place and on the occasion in question failed to keep a proper

lookout and failed to take steps to avoid being struck, and that such failure proximately caused or contributed to cause the accident in question and the damages, if any, to plaintiff.

V.

These defendants allege that at the time and place and on the occasion in question the crane was being operated by persons who at that time were loaned servants of Strachan Shipping Company, and were acting under the direction and supervision of Strachan Shipping Company, and that Strachan Shipping Company is responsible for any acts of the operators of the said crane at the time and place and on the occasion in question. In this connection the defendants would show that Galveston Wharves duly enacted, published, and filed Tariff Circular 4-B, effective January 10, 1960, and which was in effect at the time of this alleged accident and Strachan Shipping Company rented said crane and the operators under Item No. 155 of said Tariff. Said Tariff provided specifically in Item No. 97 thereof as follows:

> "When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.
>
> "It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be

considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters."

VI.

Defendants allege that Strachan Shipping Company, acting by and through its employees, agents and servants in the course of their employment were the sole proximate cause of the accident in question.

WHEREFORE, having fully answered, these defendants pray judgment of the Court that plaintiff take nothing by reason of his suit against these defendants, and that these defendants go hence without day and with their costs.

McLEOD, ALEXANDER,
POWEL & APFFEL

By: _____
V. W. McLeod
808 Sealy & Smith
Professional Bldg.
Galveston, Texas
Attorneys For Defendants.
City of Galveston, Its Mayor, and
the Board of Trustees of
Galveston Wharves

CROSS-ACTION

These defendants adopt by reference the cross-action contained in their original answer.

McLEOD, ALEXANDER,
POWEL & APFEL

By _____
V. W. McLeod
808 Sealy & Smith
Professional Bldg.
Galveston, Texas
Attorneys For Defendants
And Cross Plaintiffs,
City of Galveston, Its Mayor, and
the Board of Trustees of
Galveston Wharves

NO. 96,190

IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS
56TH JUDICIAL DISTRICT

C. V. RORIE

VS.

AVENUE SHIPPING CO., LTD., ET AL

DEFENDANT CITY OF GALVESTON'S ANSWER AND CROSS-ACTION

(Filed April, 1961)

TO THE SAID HONORABLE COURT:

COME NOW City of Galveston, its Mayor, and its Board of Trustees of the Galveston Wharves, hereinafter some times for convenience called "Galveston Wharves", and file this their original answer to plaintiff's petition on file herein:

I.

PLEA IN ABATEMENT

That this defendant, City of Galveston, which is the only proper party among these defendants, specially pleads that the plaintiff herein did not have the right to and cannot bring his suit and cause of action against this defendant for the reasons that said plaintiff is not authorized under the circumstances to sue this defendant; said plaintiff has failed to comply with the hereinafter quoted provisions of the Code of the City of Galveston, Texas; that compliance with such provisions is a condition precedent to any action herein, if any such exists, and by

reason of the facts hereinafter alleged, this suit and cause of action may be abated. In this connection, this defendant specially pleads that the Board of Commissioners of the City of Galveston on December 27, 1956, and at a time prior to the accrual of any alleged cause of action in favor of the plaintiff duly passed, adopted and published as required by law, Section 15 and 15A of the Code of the City of Galveston reading as follows:

"BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF GALVESTON:

SECTION 1: Chapter 1 of the Code of the City of Galveston, 1948, is hereby amended by adding thereto Section 15 and 15A, to read as follows:

Section 15: Notice of Claim Against City for Damages.

Before the City of Galveston shall be liable for damages for personal injuries of any kind, or for damages for death of any person or persons, or for injuries to or destruction of property of any kind, the person injured, or those entitled to claim by law for wrongful death, or the owner of the property injured or destroyed, or someone in his behalf, shall give the Board of Commissioners notice in writing of such injury, death or destruction, duly verified within thirty (30) days after the same has been sustained, stating in such written notice when, where and how the injury, death, or destruction occurred, and the apparent extent thereof, the amount of damage sustained, the amount for which claimant will settle, the actual residence of the claimant by street and number at the date the claim is presented, and the actual residence of such claimant for six (6) months immediately preceding the occurrence of such injuries, death, or destruction, and the names and

addresses of the witnesses upon whom he relies to establish his claim, and a failure to so notify the Board of Commissioners within the time and in the manner specified herein shall exonerate, excuse and exempt the City from any liability whatsoever.

Section 15A. Neither the Mayor, any individual commissioner, nor any other officer or employee of the City of Galveston shall have authority to waive any of the provisions of the foregoing Section 15 of Chapter 1 of the Code of the City of Galveston, 1948, but same may be waived only by resolution of the Board of Commissioners of the City of Galveston, made and passed before the expiration of said period of thirty (30) days provided for in said section above, and which resolution shall be evidenced by the minutes and records of said City Commission.

Section 2: This Ordinance shall be effective from and after its adoption and publication as required by law."

That prior to September 6, 1960, the said above described Ordinances have been duly passed, adopted and published as required by law and prior to September 6, 1960, the date of the alleged injury to the plaintiff, and were in full force and effect as valid and existing Ordinances of the City of Galveston; that plaintiff herein is claiming personal injuries against this defendant and failed to and did not give notice in writing of any such injury, which is the subject matter of this suit within thirty (30) days after the same had been sustained and, in fact, did not give any notice at all as required by Section 15 of the Code of the City of Galveston. Specifically, plaintiff herein failed to and did not give the Board of Commissioners of the City of Galveston notice in writing of any

such alleged injury, duly verified, within thirty (30) days after said injury was alleged to have been sustained and consequently, plaintiff, not having given such notice and not stating in any such notice when, where and how the alleged injuries occurred or the apparent extent thereof or the amount of damage sustained, or the amount for which the claimant would settle, or the actual residence of the claimant, or the actual residence of such claimant six (6) months immediately preceding the occurrence of such alleged injury or the names and addresses of the witnesses upon which the plaintiff relies to establish his claim, and this defendant further specially pleads that by reason of the failure to comply with Section 15 and Section 15A of the Ordinances of the City of Galveston under the Code of the City of Galveston, plaintiff herein was not entitled to maintain this action and it should in all respects be dismissed.

WHEREFORE, this defendant, City of Galveston, respectfully prays that its Plea in Abatement be sustained and that this cause be dismissed.

II.

Subject to the foregoing, and without waiving the same, these defendants deny each and every, all and singular, the allegations contained in plaintiff's petition and demand strict proof thereof.

III.

Defendants allege that plaintiff at the time and place and on the occasion in question failed to exercise the care that an ordinary prudent person would have exercised under the same or similar circumstances and that such

failure proximately caused or contributed to cause the accident in question and the damages, if any, to plaintiff.

IV.

These defendants allege that at the time and place and on the occasion in question the crane was being operated by persons who at that time were loaned servants of Strachan Shipping Company, and were acting under the direction and supervision of Strachan Shipping Company, and that Strachan Shipping Company is responsible for any acts of the operators of the said crane at the time and place and on the occasion in question. In this connection the defendants would show that Galveston Wharves duly enacted, published, and filed Tariff Circular 4-B, effective January 10, 1960, and which was in effect at the time of this alleged accident and Strachan Shipping Company rented said crane and the operators under Item No. 155 of said Tariff. Said Tariff provided specifically in Item No. 97 thereof as follows:

> "When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.
>
> "It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such opera-

tor during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters."

V.

Defendants allege that Strachan Shipping Company, acting by and through its employees, agents and servants in the course of their employment were the sole proximate cause of the accident in question.

WHEREFORE, having fully answered, these defendants pray judgment of the Court that plaintiff take nothing by reason of his suit against these defendants, and that these defendants go hence without day and with their costs.

McLEOD, MILLS, SHIRLEY
& ALEXANDER

By s/ V. W. McLEOD
V. W. McLeod
801 Santa Fe Building
Galveston, Texas

Attorneys for Defendants,
City of Galveston, its Mayor, and
the Board of Trustees of Galveston
Wharves

THE STATE OF TEXAS)
COUNTY OF GALVESTON)

BEFORE ME, the undersigned authority, on this day personally appeared V. W. McLeod, who being by me duly sworn, on his oath deposes and says that he is the attorney of record for the above named defendants and as such is authorized to make this affidavit and that the facts and statements made in the foregoing Plea in Abatement (Paragraph 1) are true and correct.

s/ V. W. McLEOD

SUBSCRIBED AND SWORN TO before me by the said V. W. McLeod this 20th day of April, 1961, to certify which witness my hand and seal of office.

(Seal)

s/ Florence D. LaGrange
NOTARY PUBLIC in and for
Galveston, County, Texas

CROSS-ACTION

And now becoming actor, City of Galveston, its Mayor, the Board of Trustees of Galveston Wharves, and file this their cross-action against Strachan Shipping Company, a corporation, and a person not heretofore a party to this suit, and for grounds therefor would respectfully show the Court the following:

I.

Strachan Shipping Company is a corporation authorized to do business in the State of Texas, with an agent in Galveston, Galveston County, Texas, upon whom service of citation may be had for such corporation.

II.

The City of Galveston and the Board of Trustees of the Galveston Wharves on September 6, 1960, did lease a crane to Strachan Shipping Company. That such crane was leased under the terms of Section 155 of Tariff Circular 4-B of the Galveston Wharves, which Tariff Circular was duly enacted, published and filed by the Board of Trustees of the Galveston Wharves, and which was in effect at all times material hereto. That said leasing arrangement under Section 155 was for the crane and also the operators and under Item 97 of such Tariff it was specifically provided as follows:

> "When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.
>
> "It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such op-

erator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters."

III.

That at the time and place and on the occasion in question the operators of said crane were under the direction and supervision and control of Strachan Shipping Company, and were so acting under the direction, supervision and control of Strachan Shipping Company and thereby became in law employees of Strachan Shipping Company and for whose actions Strachan Shipping Company became responsible.

IV.

That the said crane operators were taking directions as to how to operate the crane from an employee of Strachan Shipping Company and the crane was operated in accordance with directions and supervision of such employee of Strachan Shipping Company.

V.

That if there was any negligence in causing the accident in question that it was due to an act and by virtue of the acts of employees of Strachan Shipping Company operating in the course and scope of their employment.

VI.

That under the terms of said leasing agreement and by virtue of the fact that the crane was being operated by

and under the direction and control and pursuant to the orders of the employees of Strachan Shipping Company, Strachan Shipping Company is in law obligated to indemnify and save harmless these cross-plaintiffs from any amounts that may be awarded against these defendants, together with the costs of Court, expenses of investigation, and reasonable attorney's fees.

WHEREFORE, these cross-plaintiffs pray that they have recovery of and from Strachan Shipping Company for any amount that may be awarded in favor of plaintiff against these cross-plaintiffs, and that these cross-plaintiffs recover of and from Strachan Shipping Company their costs of Court, expenses of investigation and reasonable attorney's fees, which at this time the cross-plaintiffs are unable to state accurately, but which they estimate to be in the sum of Five Thousand and 00/100 Dollars ($5,000.00), and that these cross-plaintiffs have such other and further relief, general and special, in law and in equity, to which they may be entitled against Strachan Shipping Company.

McLEOD, MILLS, SHIRLEY & ALEXANDER

By /s/ V. W. McLEOD
V. W. McLeod
801 Santa Fe Building
Galveston, Texas

ATTORNEYS FOR CROSS-PLAINTIFFS, City of Galveston, its Mayor, and the Board of Trustees of Galveston Wharves

IN THE
DISTRICT COURT OF GALVESTON COUNTY
56th JUDICIAL DISTRICT OF TEXAS

* * *

NO. 96,190

C. V. RORIE, Plaintiff
v.
AVENUE SHIPPING CO., LTD., ET AL, Defendants

(Filed February 16, 1968)

FIRST AMENDED ANSWER TO CROSS-ACTION OF DEFENDANT CITY OF GALVESTON AND CROSS-ACTION OF STRACHAN SHIPPING COMPANY

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Strachan Shipping Company, and for first amended answer to the cross-action of the defendant City of Galveston would respectfully show as follows:

1.

By way of special exceptions, cross-defendant would respectfully urge:

(a) Cross-plaintiff's cross-action does not state a cause of action at law against cross-defendant and cross-defendant prays that the petition accordingly be dismissed with costs.

(b) Cross-defendant excepts to that portion of Paragraph II of the cross-action which refers to and

quotes from Item 97 of Tariff Circular 4-B of the Galveston Wharves for the reason that said Item 97 of the said Tariff is invalid, null, void, inoperative and legally unenforceable as a matter of law, and said provision is constitutionally unenforceable and invalid because it constitutes an undue burden on interstate and foreign commerce and is an attempt by cross-plaintiff by unilateral action and monopolistic control to shift its own liability for the negligence of its employees and the lack of reasonable fitness of its equipment to this cross-defendant, without consideration therefor, to cross-defendant's prejudice. Alternatively, cross-defendant says the said tariff provision is invalid until determined valid by an appropriate administrative agency.

Of which special exceptions, cross-defendant prays judgment of the Court, together with costs.

2.

Without waiving the foregoing special exceptions, but still insisting upon the same, for further answer herein, if any be necessary, cross-defendant denies each and every, all and singular, the allegations in said cross-action contained, and demands strict proof thereof.

3.

For further answer herein, if any be necessary, and without waiving the foregoing special exceptions and general denial, cross-defendant would respectfully show that in the event that it be found as alleged by cross-plaintiff that the plaintiff's alleged injuries were sustained as

a proximate result of cross-defendant's employee's negligence, that cross-defendant can in no wise be held liable, because plaintiff at the time of his alleged injury was an employee of cross-defendant and cross-defendant had at the time of said alleged injuries fully complied with the laws of the State of Texas and of the United States by providing workmen's compensation insurance to compensate plaintiff for injuries such as he allegedly received, and hence as a matter of law and fact this cross-defendant cannot be held liable to plaintiff and is not liable to either plaintiff or defendant, the plaintiff and the negligent party both being employees of cross-defendant.

4.

For further answer herein, if any be necessary, and without waiving the foregoing special exceptions and general denial, and special plea, cross-defendant would respectfully show in the alternative by way of special defense that if it be mistaken in its special plea that it is not liable to plaintiff or cross-plaintiff because of having complied fully with the laws of the State of Texas and of the United States by providing workmen's compensation insurance to compensate plaintiff for the injuries, if any, then cross-defendant would show it is in no way liable to cross-plaintiff because the tariff provisions relative to the crane and crane operator quoted in paragraph II of the cross-action are void and unconstitutional as against public policy, and are inoperative and void by reason of unlawful business compulsion in that cross-defendant was unable to obtain use of the said crane except under the said tariff provisions, the cross-defendant being permitted to use on the occasion in question no other crane than that of cross-plaintiff (Galveston Wharves), and

none other being available, said tariff provisions hence being illegal, null, void, inoperative, and legally unenforceable, and affording no basis for the claim now made by cross-plaintiff against cross-defendant by way of this cross-action.

5.

For further answer herein, if any be necessary, and without waiving the foregoing special exceptions and general denial, and the foregoing special pleas, cross-defendant would show by way of special denial that it in no wise made any agreement to indemnify cross-plaintiff against any suits or claims such as that herein sued upon, that it in no wise and at no time agreed to hold cross-plaintiff harmless against any claims or suits of any kind, including those herein asserted and sued upon, and it expressly denies accordingly any and all liability to cross-plaintiff as well as to plaintiff.

CROSS-CLAIM

And now by way of cross-action against defendant City of Galveston (hereinafter called City), cross-plaintiff Strachan Shipping Company (hereinafter called Strachan) would respectfully show as follows:

1.

That on or about September 6, 1960, Strachan Shipping Company was engaged by the owners and/or charterers of the M/S ARMAGH to discharge a cargo of bulk ore from said vessel, which was then moored in the Port of Galveston, Texas. Strachan then engaged the City of Galveston, as an independent contractor, to furnish for the

said work of discharging the ore from the SS ARMAGH a shore-based crane, which operated on railroad tracks on the wharves of the City, together with an employee of the City to operate the said crane during the discharging operations.

2.

When the crane and its operator reached shipside the discharging operations commenced and continued without event until most of the ore had been removed from the ship's No. 5 lower hold, when suddenly and without warning the operator of the crane, the servant of the City, carelessly and negligently dropped the clamshell bucket of the crane into the No. 5 lower hold allowing it to strike a bulkhead or the vessel's propeller shaft tunnel, which deflected it into the wings of the hold and caused it to strike and injure the plaintiff.

3.

Cross-plaintiff would show that the City of Galveston, in its proprietary capacity, sole owner and operator of the Galveston Wharves, and the railroad cranes and other equipment thereon, was engaged in the business of owning, leasing, renting and operating land-based railway cranes and other similar equipment on its premises and furnishing its servants and employees as operators of said cranes, all of such operations being conducted for profit in the furtherance of the business of the said City of Galveston in its proprietary capacity; and that no other persons, firms or corporations are permitted by the said City of Galveston to own or operate railway cranes in the Port of Galveston, such ownership and operations being a non-

competitive monopoly which the City of Galveston has reserved solely unto itself.

4.

The City of Galveston, on the occasion in question, had sole supervision and control and right of supervision and control over the crane and its operator, and Strachan Shipping Company had no control or right of control over the crane and its operator, was not permitted to furnish its own operator and did not supervise the work of the crane and its operator in any respect. If the plaintiff was injured through any cause other than his own negligent conduct, such injuries were proximately caused solely and in part by the negligent operation of the crane by the City of Galveston's servant or the failure of the City to furnish a crane reasonably fit for its intended purposes.

5.

Under the said rental agreement and the applicable law the City of Galveston warranted that it would perform its work of discharging the ore from the SS ARMAGH in a proper and workmanlike manner, and that the railroad crane furnished by it would be reasonably fit for that purpose, and that the operator thereof, the servant of the City of Galveston, would possess knowledge and skills equal to others in his calling sufficient to perform the assigned work in a proper and workmanlike manner. If plaintiff was injured on the occasion in question and his injuries resulted from the fault of anyone other than himself, which is not admitted, then such injuries resulted from the failure of City of Galveston to perform its services in the discharge of the cargo from the vessel in a

good and workmanlike manner, which was a breach of its warranty to Strachan and Strachan is therefore entitled to have indemnity against the City of Galveston for the full amount of any judgment which may be rendered against it herein, together with its costs, disbursements and attorneys' fees.

WHEREFORE, PREMISES CONSIDERED, Strachan Shipping Company prays that upon trial hereof judgment be entered herein that the cross-plaintiffs City of Galveston and Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd., take nothing against it by their cross-actions herein against Strachan Shipping Company, and that Strachan Shipping Company have its costs herein, or in the alternative, Strachan Shipping Company, as cross-plaintiff, prays that in the event any judgment be rendered against it herein, that it be given judgment over against the City of Galveston for any sums for which it may be liable herein, together with its disbursements and attorneys' fees herein expended and costs of court, and for such other and further relief to which it may be justly entitled.

EIKEL & GOLLER

By THEODORE GOLLER
205 Oil & Gas Building
Houston, Texas 77002
Attorneys for Strachan
Shipping Company

NO. 96,190

IN THE
DISTRICT COURT OF GALVESTON COUNTY
56th Judicial District of Texas

C. V. RORIE, JR.
v.
AVENUE SHIPPING CO., LTD., ET AL.

FIRST AMENDED ANSWER TO CROSS-ACTION OF DEFENDANTS AVENUE SHIPPING CO., LTD., AND TRINDER ANDERSON & CO., LTD., AND CROSS-ACTION OF STRACHAN SHIPPING COMPANY

To The Honorable Judge Of Said Court:

NOW COMES Strachan Shipping Company, and for first amended answer to the cross-action of defendants Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd., would respectfully show as follows;

1.

By way of special exception, cross-defendant would respectfully urge that the cross-action of Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd., does not state a cause of action at law against this cross-defendant and cross-defendant prays that the cross-claim accordingly be dismissed with costs.

2.

Without waiving the foregoing special exception, but still insisting upon the same, for further answer herein, if any be necessary, Cross-defendant denies each and every, all and singular, the allegations in said cross-claim contained, and demands strict proof thereof.

3.

Without waiving the foregoing special exception or general denial, for further answer herein, if any be necessary, this cross-defendant would show that if the plaintiff was injured, as alleged, which is not admitted but denied, such injuries, if any, proximately resulted in whole or in part from his own negligence in failing to stand clear of the area of the No. 5 lower hold of the SS ARMAGH where the clamshell bucket of the shoreside crane, owned and operated by defendant City of Galveston, was expected to land as it was lowered into the hold for the purpose of discharging ore.

4.

For further answer, if any be necessary, and without waiving the foregoing special exception, general denial and special pleas, this cross-defendant would show that the plaintiff's injuries, if any, were the result of an unavoidable accident.

5.

For further answer herein, if any be necessary, and without waiving the foregoing pleas, or any of them, this cross-defendant would show that if the plaintiff was injured through any cause other than his own negligent conduct, such injuries were proximately caused solely by the failure of the defendant City of Galveston to provide a reasonably safe crane and the negligent acts and conduct of the City's employee in the operation of said crane. Alternatively, such failure of the said defendant to furnish a reasonably safe crane and the negligence of its employee in the operation of said crane was a proximate cause of the plaintiff's injuries, if any.

6.

For further answer, if any be necessary, and without waiving the foregoing special exception, general denial or special pleas, this cross-defendant would show in the alternative that if the plaintiff was injured through any cause other than his own negligence or the failure of defendant City of Galveston to provide a reasonably safe crane or the negligence of the City's employee in the operation of said crane such injuries, if any were proximately caused by the failure of the cross-plaintiffs Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd., to furnish adequate and proper ship's tackle and gear for removal of the cargo of ore from the No. 5 lower hold of the SS ARMAGH with reasonable safety and the failure of said cross-plaintiffs to furnish Strachan's employees a reasonably safe place to work in the No. 5 lower hold of said vessel.

Strachan Shipping Company would further show that the cross-plaintiffs represented and warranted to it that the SS ARMAGH was suitable for discharge by mechanical equipment, and if it should be found that the No. 5 lower hold of the said vessel was not suitable for discharge of the cargo therefrom by mechanical equipment, the failure of the cross-plaintiffs to furnish a suitable vessel for mechanical discharge constituted a breach of said warranty and representations and the acquiescence of cross-plaintiffs in the method of discharge in effect at the time of the plaintiff's injuries, if any, constituted conduct sufficient to preclude the cross-plaintiffs from recovering indemnity herein from Strachan Shipping Company.

CROSS-CLAIM

And now by way of cross-action against defendants Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd. (hereinafter called Avenue and Trinder Anderson) cross-plaintiff Strachan Shipping Company (hereinafter called Strachan) would respectfully show:

1.

That on or about August 1, 1960, prior to the arrival of the SS ARMAGH in the Port of Galveston, the cross-defendants Avenue and Trinder Anderson, through their duly authorized agents and representatives, represented and warranted to Strachan that the said vessel was suitable for the discharge of its cargo of bulk ore by mechanical equipment; and that in reliance upon such representations and warranties Strachan hired from the defendant City of Galveston mechanical equipment for use in such discharge consisting of a shore-based crane having attached a clam-shell bucket for scooping the ore from the holds of the vessel and loading it into railway cars on the dock, together with an operator, an employee and servant of the City.

The said crane and its operator were employed by Strachan for the discharge of this ore from the SS ARMAGH in reliance upon the said representations and warranties. If it should be found that the No. 5 lower hold of the SS ARMAGH was not suitable for discharge of the cargo of bulk ore therefrom by the aforesaid mechanical equipment, the failure of the cross-plaintiffs, Avenue and Trinder Anderson, to furnish a suitable vessel for mechanical discharge constituted a breach of the said

representations and warranties proximately causing the plaintiff's injuries, and in the event any judgment be entered against Strachan Shipping Company herein Strachan prays that it have judgment over against cross-defendants Avenue and Trinder Anderson for full indemnity for any sums it may be required to pay the plaintiff herein or defendant City of Galveston, including all disbursements and attorneys' fees incurred in the defense of their suits.

WHEREFORE, PREMISES CONSIDERED, Strachan Shipping Company prays that upon trial hereof judgment be entered that defendants City of Galveston and Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd., take nothing against Strachan by their cross-action, and that Strachan have its costs herein; alternatively, Strachan Shipping Company, as cross-plaintiff, prays that in the event judgment be rendered against it herein, that it be given judgment over against Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd., for any sums for which it may be liable herein, together with its disbursements and attorneys' fees herein expended and costs of court, and for such other and further relief to which it may be justly entitled.

EIKEL & GOLLER

By THEODORE GOLLER
205 Oil & Gas Building
Houston, Texas 77002
Attorneys for Strachan
Shipping Company

NO. 96,190

IN THE DISTRICT COURT OF GALVESTON
COUNTY, TEXAS
56TH JUDICIAL DISTRICT

C. V. RORIE
VS.
AVENUE SHIPPING COMPANY, LTD., ET AL

AMENDED PETITION IN INTERVENTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Texas Employers' Insurance Association, hereinafter styled intervenor, and files this its petition in intervention, with leave of the Court first obtained, and for such would respectfully show unto the Court;

I.

Other than your intervenor, the parties are set forth in plaintiff's original petition.

II.

Intervenor carried compensation insurance as set out in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sections 901 et seq., on Strachan Shipping Company when Rorie was injured in the course and scope of his employment with Strachan Shipping Company, in Galveston County, Texas, on or about September 6, 1960. Pursuant to its obligation to do so, intervenor has, as of February 16, 1968, paid out the total sum of TWENTY-ONE THOUSAND FOUR HUNDRED TWELVE and 46/100 DOLLARS ($21,412.46) in com-

pensation and medical benefits to C. V. Rorie under the Longshoremen's and Harbor Workers' Compensation Act.

III.

The allegations of negligence and unseaworthiness as contained in the plaintiff's original petition are for the purpose of this petition of intervention adopted. Under the terms and provisions of the Longshoremen's and Harbor Workers' Compensation Act, Texas Employers' Insurance Association is entitled to recover out of the first sums awarded plaintiff in his action against the defendants the amount of its expenditures for compensation, medical benefits furnished along with attorneys' fees in the reasonable amount of TWO THOUSAND FIVE HUNDRED and No/100 DOLLARS ($2,500.00).

WHEREFORE, premises considered, intervenor prays that upon a trial it do have and recover its damages in the amount of $21,412.46, plus any additional compensation paid from December 23, 1965, until judgment is entered and reasonable attorneys' fees in the sum of $2,500.00, and such other relief, both at law or in equity, to which intervenor is justly entitled.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By_____
Dixie Smith
Bank of the Southwest Building
Houston, Texas 77002 CA4-7070

Attorney for Intervenor, Texas Employers' Insurance Association

NO. 96,190

IN THE DISTRICT COURT OF GALVESTON
COUNTY, TEXAS
56TH JUDICIAL DISTRICT

C. V. RORIE
VS.
AVENUE SHIPPING COMPANY, LTD., ET AL

(Filed March 6, 1968)

STIPULATION OF COMPENSATION LIEN

COMES NOW C. V. Rorie, plaintiff; Avenue Shipping Company, Ltd., Trinder, Anderson & Company, Ltd., defendants-third party plaintiffs, and the City of Galveston, its Mayor and its Board of Trustees of the Galveston Wharves, defendants-cross defendants; and Strachan Shipping Company, third party defendant; by and through their attorneys of record, and hereby formally stipulate and agree as follows:

I.

On or about September 6, 1960, and at all times material hereto, plaintiff in this cause, C. V. Rorie, was an employee of third party defendant, Strachan Shipping Company; Strachan Shipping Company was an "employer" as the word is defined to mean in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq. Strachan Shipping Company secured the payment of compensation to its employees under said Act by subscribing to a policy of compensation insurance issued to it by Texas Employers' Insurance Association, which

policy was in full force and effect at the time of the accident made the basis of this suit, and the policy mentioned above provided coverage to Strachan Shipping Company for the benefit of its employees subject to the terms and provisions of the Longshoremen's & Harbor Workers' Compensation Act.

II.

On or about September 6, 1960, the plaintiff, C. V. Rorie, sustained injuries in the course of his employment for Strachan Shipping Company while engaged in maritime employment on navigable waters of the United States, which injuries are the basis of this suit; by reason of said injuries, Strachan Shipping Company's compensation insurance carrier, Texas Employers' Insurance Association, became liable to pay, and has paid compensation benefits and medical expenses to and for the benefit of plaintiff, C. V. Rorie, pursuant to its obligations under the Longshoremen's & Harbor Workers Compensation Act; and the said compensation benefits and medical expenses paid to and for the benefit of C. V. Rorie, were reasonable and necessary; as of February 16, 1968, Texas Employers' Insurance Association has become liable to pay and has paid weekly compensation benefits in the amount of $54.00 per week for 320 weeks, amounting to a sum of $17,280.00 in compensation benefits directly to C. V. Rorie and the sum of $4,132.46 in medical expenses for the benefit of C. V. Rorie, a total sum of $21,412.46.

III.

It is agreed that Texas Employers' Insurance Association waives its right to attorneys' fees which it might

otherwise be entitled as set out in its petition in intervention.

IV.

This stipulation and agreement is made solely for the purpose of establishing the rights of Texas Employers' Insurance Association in the event the plaintiff herein shows himself entitled to any recovery in this suit, and none of the terms of this stipulation may be used for any other purpose.

EXECUTED this 6th day of March, 1968, on behalf of plaintiff and his attorneys of record, Mandell & Wright.

By /s/ Arthur Mandell
ARTHUR MANDELL

EXECUTED this 6th day of March, 1968, on behalf of Avenue Shipping Company, Ltd., defendant-third party plaintiff and their attorneys, Royston, Rayzor & Cook.

By /s/ B F W
BRYAN WILLIAMS

EXECUTED this 6th day of March, 1968, on behalf of the City of Galveston, its Mayor, and its Board of Trustees of the Galveston Wharves, defendants-cross defendants and their attorneys, McLeod, Alexander, Powell & Apffel.

By /s/ V. W. McLeod
V. W. McLEOD

EXECUTED this 6th day of March, 1968, on behalf of Strachan Shipping Company, third party defendant, and their attorney, Robert Eikel.

By /s/ Theodore Goller
ROBERT EIKEL

EXECUTED this 6th day of March, 1968, on behalf of Texas Employers' Insurance Association, intervenor and their attorneys, Fulbright, Crooker, Freeman, Bates & Jaworski.

By /s/ Dixie Smith
DIXIE SMITH

NO. 96,190

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS — 56th JUDICIAL DISTRICT

C. V. RORIE, JR.
v.
AVENUE SHIPPING CO., LTD., ET AL

MOTION TO AWARD ATTORNEYS' FEES TO MESSRS. MANDELL & WRIGHT FOR CREATING THE FUND

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW MANDELL & WRIGHT, attorneys, by and through Arthur J. Mandell, and respectfully move the Court to allow them a reasonable attorneys' fees for creating the fund for Intervenor Texas Employers' Insurance Association, thus making it possible to reimburse said Intervenor the sum of Twenty-One Thousand Four Hundred Twelve and 46/100 Dollars ($21,412.46) and in support thereof would respectfully show your Honorable Court as follows:

I

Your movants would respectfully show that Intervenor, Texas Employers' Insurance Association, pursuant to the provisions of the Longshoremen's & Harbor Workers' Compensation Act, Title 33, Sec. 901, et seq. has paid the sum of Seventeen Thousand Two Hundred Eighty Dollars ($17,280.00) as compensation to Plaintiff C. V.

Rorie, Jr. and Four Thousand One Hundred Thirty-Two and 46/100 Dollars ($4,132.46) for medical expenses by reason of the injuries sustained on September 6, 1960. The said C. V. Rorie, Jr., by and through his attorneys of record, Messrs. Mandell & Wright, filed what is generally termed a third party action against Avenue Shipping Company, Ltd., Trinder, Anderson & Co., Ltd., and the City of Galveston, seeking to recover compensatory damages and medical expenses. That your movants have done a great deal of work in the filing, preparation, appealing and trying said lawsuit and as a result of such effort have created a fund of Seventy-Nine Thousand One Hundred Thirty-Two and 46/100 Dollars ($79,132.46), out of which Intervenor Texas Employers' Insurance Association has been benefited by recovering the full amount of the monies expended under their obligation of the Longshoremen's & Harbor Workers' Compensation Act. Plaintiff would show that Plaintiff C. V. Rorie, Jr. has incurred expenses in the amount of $1,060.42 and has agreed to pay your movants herein as his attorneys, one-third of the total recovery of damages by reason of the injuries sustained on the occasion made the basis of this suit. Intervenor Texas Employers' Insurance Association did not seek, nor instituted any action for the recovery from these Defendants or anyone else seeking to recover these expenditures. That without such effort by Plaintiff and his attorneys' movements herein, Intervenor, Texas Employers' Insurance Association, could never have recovered these funds. Therefore, movants under the applicable law and equitable principles are entitled to the proportionate share of the attorneys' fees and expenses as the entire amount relates to the amount recovered by Texas Employers' Insurance Association.

In connection therewith, your movants would respectfully show that they have a contract with Plaintiff C. V. Rorie, Jr. wherein he agreed to pay one-third of the total amount that may be recovered in this cause of action. It would be unjust and unfair to place the entire liability of the efforts to recover these funds upon Plaintiff C. V. Rorie, Jr. Therefore, it is just, fair and equitable that Plaintiff's attorneys, Mandell & Wright, be awarded one-third as attorneys' fees of the Twenty-One Thousand Four Hundred Twelve and 46/100 Dollars ($21,412.46) and the proportionate share of the reasonable expenses incurred in the presentation of this case out of the funds awarded to Texas Employers' Insurance Association.

WHEREFORE, it is respectfully prayed that the Court award Messrs. Mandell & Wright a proportionate share of the attorneys' fees commensurate with the amount awarded to Texas Employers' Insurance Association, plus a proportionate share of the costs of preparation in the trial of this case.

Respectfully Submitted,

MANDELL & WRIGHT

By_____
Attorneys for Plaintiff,
C. V. Rorie, Jr.

NO. 96,190

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS — 56th JUDICIAL DISTRICT

C. A. RORIE

v.

AVENUE SHIPPING CO., LTD., ET AL

v.

STRACHAN SHIPPING COMPANY

SECOND AMENDED ORIGINAL ANSWER AND CROSS-ACTION OF DEFENDANTS AVENUE SHIPPING CO., LTD., AND TRINDER ANDERSON & CO., LTD.

TO SAID HONORABLE COURT:

Now comes AVENUE SHIPPING CO., LTD., and TRINDER ANDERSON & CO., LTD., defendants in the captioned cause, and file this their Second Amended Original Answer and Cross-Action as follows:

I.

These defendants specially except to Plaintiff's Third Amended Original Petition as a whole inasmuch as it does not allege the manner or way in which it is claimed any negligence of either of these defendants, or any unseaworthiness of the Vessel ARMAGH, caused or contributed to any of the injuries complained of by plaintiff.

WHEREFORE, defendants pray judgment of this special exception.

II.

These defendants further specially except to Plaintiff's

Third Amended Original Petition as a whole and to Paragraph III, IV and V thereof, insofar as they allege that these defendants owed an absolute and nondelegable duty to the plaintiff to provide a safe place to work and/or to provide tools and equipment which would permit or cause plaintiff to do his work without harm inasmuch as said allegation improperly describes the duty owed by these defendants to plaintiff, which was not a duty of insuring his safety but merely to provide him with a vessel and appurtenances reasonably fit for the purpose for which they were intended and to exercise reasonable care for his safety.

WHEREFORE, these defendants pray judgment on this special exception.

III.

These defendants deny each and every all and singular the allegations in plaintiff's petition contained and demand strict proof thereof and of this they put themselves upon the country.

IV.

Further answering if necessary, these defendants say that plaintiff's injuries, if any, resulted solely or, in the alternative, proximately from his own negligence in the following particulars among others:

(a) In failing to keep a ptoper lookout for his own safety.

(b) In failing to take a safe position in the hold so as to place himself as far away from the crane bucket as possible.

(c) In failing to observe the signals being given in connection with the operation of the crane or, in

the alternative, if it be found that plaintiff did observe such signals, in failing to heed them.

(d) In failing to watch the bucket carefully and to warn or alert those operating it of the possibility that it might strike some part of the vessel.

(e) In failing to arrange and agree with the signalman upon the proper signals to be used.

(f) In failing to see that the signalman gave plaintiff a sufficient period of time to remove himself to a position of safety prior to the crane bucket's entry into the hold.

(g) If it should be found that the method being utilized to discharge the cargo on the occasion in question was not reasonably safe, which is not admitted but denied, then plaintiff was negligent in failing to suggest this fact to the other members of the gang and or in continuing to expose himself to the unreasonable danger.

V.

Further answering, if necessary, these defendants say that plaintiff's injuries, if any, were the result of an unavoidable accident.

VI.

By way of cross-action against the impleaded defendant, Strachan Shipping Company, these defendants would show that the charterers of the Vessel ARMAGH had contracted and agreed with Strachan Shipping Company for the discharging of cargo from the Vessel ARMAGH on the occasion in question and that under the terms of said contract and the applicable law Strachan Shipping Company owed to these defendants, as beneficiaries of the aforesaid contract, the warranty that its services in the premises

would be performed in a workmanlike, reasonable and safe manner and these defendants say that if plaintiff was injured on the occasion in question and if his injury resulted from the fault of anyone other than himself, which is not admitted, then plaintiff's injuries resulted from the failure of Strachan Shipping Company to perform its services aboard the vessel in a reasonably safe and workmanlike manner and further resulted from a breach by said Strachan Shipping Company of its warranty which runs to these defendants as aforesaid and these defendants therefore pray that in the event any judgment be entered against them they have judgment over against impleaded defendant, Strachan Shipping Company, by way of full indemnity and that in any event these defendants have judgment against Strachan Shipping Company for all costs, expenses and attorneys' fees incurred by these defendants in their defense of plaintiff's suit.

VII.

By way of cross-action against the defendant, City of Galveston, and impleaded defendant, Strachan Shipping Company, these defendants would show that on the occasion in question said defendant City had agreed to provide a crane and the personnel necessary to operate the same to be utilized by the impleaded defendant Strachan Shipping Company, in connection with the discharging of the Vessel ARMAGH. These defendants say that if plaintiff was injured through any cause other then his own negligence it was as the proximate result of the failure of defendant City to provide a reasonably safe crane and or the proximate result of the fault and negligence of the defendant City and or those for whom it was responsible, or in the alternative said faults of defendant City combined, jointly and or

severally with the breach of the aforesaid implied warranty of impleaded defendant, Strachan Shipping Company; and these defendants therefore pray that in the event any judgment be rendered against them herein they have judgment over by way of full indemnity against the defendant City and impleaded defendant, Strachan Shipping Company, and that in any event they have judgment against the defendant City and Strachan Shipping Company for all costs, expenses and attorneys' fees incurred in the defense of this suit.

WHEREFORE, PREMISES CONSIDERED, these defendants pray that upon trial hereof judgment be entered that plaintiff take nothing by his suit and that these defendants be allowed to go hence with their costs without day, or in the alternative, they pray that in the event any judgment be rendered against them, or either of them herein, that they be given joint and several judgment over against defendant, City of Galveston, and impleaded defendant, Strachan Shipping Company, and further pray that in any event they be given judgment against the impleaded defendant, Strachan Shipping Company, and defendant, City of Galveston, for all costs, expenses and attorneys' fees incurred by these defendants in their defense against plaintiff's suit.

ROYSTON, RAYZOR & COOK

By BRYAN F. WILLIAMS
205 Cotton Exchange Building
Galveston, Texas
Attorneys for Avenue Shipping Co., Ltd., and Trinder Anderson & Co., Ltd., Defendants

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS — 56th JUDICIAL DISTRICT

NO. 96,190

E. V. RORIE
v.
AVENUE SHIPPING CO., LTD., ET AL

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO OR TO DISREGARD THE JURY'S FINDINGS ON CERTAIN ISSUES

To The Said Honorable Court:

NOW COMES City of Galveston, one of the defendants in the above entitled and numbered matter, and files this its Motion for Judgment Non Obstante Veredicto, or, alternatively, to disregard the jury's findings on certain special issues and to enter Judgment for this defendant, for each and all of the following reasons:

I.

That as a matter of law Frank McPeters, the crane operator, was at the time of this accident a loaned servant. In this connection this defendant would point out to the Court that in December, 1959, effective January 1, 1960, the City of Galveston filed with the Federal Maritime Commission and sent to Strachan Shipping Company Galveston Wharves Tariff Circular No. 4-B, and Item 97 of said tariff provided:

"It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the

> Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease."

That the filing of the tariff, or in the alternative, the sending of the tariff to Strachan Shipping Company fixed the conditions under which the crane and operator were to be leased and such terms and conditions specifically provided that the operator shall be under the direction of Strachan Shipping Company and the operator shall be considered as the agent and servant of the lessee and the lessee shall be responsible for the acts of such operator during the time of rental or lease. That this became the agreement, understanding, and contract between the City of Galveston and Strachan Shipping Company and determines the question of whether or not Frank McPeters, the crane opertor, was the loaned servant of Strachan Shipping Company. Such cases as *Magnolia Petroleum Company v. Francis* (C.A.), 169 S.W.2d 286, err. ref., and *Steele v. Wells* (C.A.), 134 S.W.2d 377, err. ref., hold that where there is an arrangment whereby the operator is to be considered the loaned servant of the lessee that this controls. Here the filing of the tariff and the sending of the tariff to Strachan Shipping Company fixed the terms and conditions upon which the crane was to be leased and in taking and using the crane the provisions of such tariff became part of the contract between the City of Galveston and Strachan Shipping Company and this is a binding arrangement and as a matter of law determines that Frank McPeters, the crane operator, was the loaned servant of Strachan Shipping Company.

H.

The Court should disregard the jury's findings to Special Issues Nos. 18 and 25, because there is no evidence to support the jury's findings and as a matter of law for the reasons given in the preceding paragraph, Frank McPeters, the crane operator, was the loaned servant of Strachan Shipping Company and would be considered in law as being its servant at the time of this accident, rather than being the servant of the City of Galveston, the general employer.

WHEREFORE, the defendant, City of Galveston, respectfully prays that the Court set this Motion for hearing and on hearing hereof grant the Motion and enter a Judgment for the defendant, City of Galveston, Non Obstante Veredicto, or in the alternative, to disregard the jury's answers to Special Issues Nos. 18 and 25 and enter Judgment for the defendant, City of Galveston, that plaintiff take nothing by reason of his suit against the defendant, City of Galveston, and City of Galveston go hence without day and with its costs.

McLEOD, ALEXANDER,
POWEL & APFEL

By_____
V. W. McLeod
808 Sealy & Smith Professional
Building
Galveston, Texas
ATTORNEYS FOR DEFEND-
ANT,
City of Galveson

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS — 56th JUDICIAL DISTRICT

NO. 96,190

C. V. RORIE
v.
AVENUE SHIPPING CO., LTD., ET AL

MOTION FOR JUDGMENT

COMES NOW C. V. RORIE, JR., Plaintiff in the above entitled and numbered cause and respectfully files this his Motion for Judgment on the verdict of the jury against the Defendants Avenue Shipping Co., Ltd., Trinder, Anderson & Company, Ltd., and the City of Galveston, and in favor of Plaintiff C. V. Rorie, Jr. and Texas Employers' Insurance Association.

Alternatively, and without waiving Plaintiff's right to have judgment against the hereinabove named three Defendants, Plaintiff C. V. Rorie, Jr. respectfully moves that Judgment for the Plaintiff and Intervenor Texas Employers' Insurance Association on the verdict of the jury be entered by the Court against Defendant City of Galveston.

MANDELL & WRIGHT

By: ARTHUR J. MANDELL
Attorneys for Plaintiff,
C. V. Rorie, Jr.

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS — 56th JUDICIAL DISTRICT,
April-May Term, A. D. 1968

NO. 96,190

E. V. RORIE, JR.

v.

AVENUE SHIPPING CO., LTD., ET AL.

Now comes the City of Galveston and files this motion, all parties having rested, with the understanding that the motion may be dictated and transcribed at a later time and will be considered for all purposes as though written out in advance, and moves the Court to instruct the jury to return a verdict for this Defendant, or, in the alternative, withdraw this case and render judgment for this Defendant for each and all of the following reasons:

I.

This Defendant would respectfully show the Court that there has been no evidence sufficient to go to the jury showing that this Defendant is in any way responsible in this particular case, because the evidence shows from the Plaintiff himself that the operator of the crane was acting under the direction and control of the stevedore and that the stevedore was in complete control of the discharging of the vessel. Therefore, the operator of the crane in law would become a lone servant, for which the City of Galveston would not be responsible.

II.

Because there is no showing of any negligence on the part of this Defendant.

III.

Because the evidence shows as a matter of law that the crane was being operated under signals from a signalman and that part of the operation, and this testimony comes from the Plaintiff himself, and he is bound by it, was to swing the crane underneath the coming of the ship.

IV.

Because, as a matter of law, the contractual arrangement between Strachan Shipping Co. and the City of Galveston set forth in Item 97 of Tariff Circular No. 4-B specifically provided that the operator shall be under the direction of Strachan Shipping Co. "and the operator shall be considered as the agent or servant of the lessee," which in this instance is Strachan Shipping Co., "and lessee shall be responsible for the acts of such operator during the time of rental or lease"; that the Tariff becomes a part of the contract of lease between the City of Galveston and Strachan Shipping Co., and this Tariff provision controls the question of whether or not at the time of this accident Frank McPeters was a borrowed servant of Strachan Shipping Co.

V.

That there has been no showing, and no competent evidence that the crane was in any way defective.

WHEREFORE Defendant City of Galveston prays that the Court instruct the jury to return a verict for Defendant, or, in the alternative, withdraw this case from the jury and enter judgment for the Defendant.

Respectfully submitted,

McLEOD, ALEXANDER, POWEL & APFFEL

By V. W. McLEOD
Attorneys for the Board of Trustees of the Galveston Wharves, and the City of Galveston

To be filed nunc pro tunc as of May 1, 1968.

COURT: Your motion would go against the Plaintiff as well as Strachan Shipping Co.?

MR. McLEOD: Yes, Your Honor.

COURT: The motion of the Defendant City of Galveston for an instructed verdict; or, in the alternative, motion that the case be removed from the jury and judgment rendered in favor of said Defendant is hereby overruled.

MR. McLEOD: To which the Defendant City of Galveston excepts. Your Honor.

THE STATE OF TEXAS §
§
COUNTY OF GALVESTON §

I, Mary E. McGowan, Official Court Reporter of the 56th District Court of Galveston County, Texas, do hereby certify that this is a true and correct transcript of the Motion dictated and proceedings had in chambers pertaining to said Motion in the presence of the Court and all Counsel in this case at the close of all the evidence.

WITNESS my hand at Galveston, Texas, this 18th day of December, A. D. 1969.

MARY E. McGOWAN
Official Court Reporter,
56th District Court,
Galveston County, Texas

NO. 96,190

IN THE
DISTRICT COURT OF GALVESTON COUNTY,
TEXAS, — 56th JUDICIAL DISTRICT
APRIL-MAY TERM, A. D. 1968

C. V. RORIE, JR.,
v.
AVENUE SHIPPING CO., LTD., ET AL.

Now come the Board of Trustees of the Galveston Wharves, and the City of Galveston, Plaintiff having rested, and move the Court, with the understanding that the motion may be dictated here and transcribed at a later time, that the Court withdraw this case from the jury and enter judgment for these Defendants, or, in the alternative, that the Court instruct the jury to return a verdict for these Defendants for each and all of the following reasons:

I.

As to the Board of Trustees of the Galveston Wharves they respectfully show the Court that they have shown that the operation known as the Galveston Wharves' operation is owned by the City of Galveston and operated by the City of Galveston through a board known as "The Board of Trustees of the Galveston Wharves"; that the courts have held in such instances that the City of Galveston is the only party that can sue or be sued, and we particularly invite the Court's attention to such decisions as Guadalupe-Blanco River Authority et al. v. Tuttle

et al., decided by the Court of Civil Appeals in 171 S.W.2d 520, and the Supreme Court refused a writ of error, with a written opinion in 174 S.W.2d 589.

II.

That there is no showing that any member of the Board of Trustees of the Galveston Wharves actually participated in the operation on this particular day or was in any way personally negligent or personally responsible.

In such instances, of course, a member of the Board of Trustees, just like a member of a board of directors or a superior officer of a company, is not responsible, and we invite the Court's attention so that there will be no dispute as to our contention in this regard to such cases as Seismic Explorations, Inc., et al. v. Dobray, decision by the Court of Civil Appeals in Houston, 169 S.W.2d 739, and the Supreme Court refused a writ of error in that case.

III.

As to both Defendants they would respectfully show the Court that there has been no evidence sufficient to go to the jury showing that these Defendants are in any way responsible in this particular case, because the evidence shows from the Plaintiff himself that the operator of the crane was acting under the direction and control of the stevedore and that the stevedore was in complete control of the discharging of the vessel. Therefore, the operator of the crane in law would become a lone servant for which the City of Galveston would not be responsible and, of course, likewise the Board of Trustees of the Galveston Wharves would not be responsible.

IV.

Because there is no showing of any negligence on the part of these Defendants.

V.

Because the evidence shows as a matter of law that the crane was being operated under signals from a signalman and that part of the operation, and this testimony comes from the Plaintiff himself, and he is bound by it, was to swing the crane underneath the coaming of the ship.

WHEREFORE these Defendants pray that they and each of them be granted a judgment and that the Court withdraw this case from the jury and enter judgment for these Defendants and each of them, or, in the alternative, that the Court instruct the jury to return a verdict for these Defendants and each of them.

Respectfully submitted,

McLEOD, ALEXANDER,
POWEL & APFFEL

By V. W. McLEOD
Attorneys for the Board of
Trustees of the Galveston
Wharves and the City of
Galveston

COURT: I grant your motion in so far as the Mayor and the Board of Trustees of the Galveston Wharves are concerned. I overrule your motion in so far as the City of Galveston is concerned at this time.

MR. McLEOD: Note our exception.

To be filed nunc pro tunc as of April 29, 1968.

THE STATE OF TEXAS §
§
COUNTY OF GALVESTON §

I, Mary E. McGowan, Official Court Reporter of the 56th District Court of Galveston County, Texas, hereby certify that, after Plaintiff had rested and the jury had retired from the Courtroom, the foregoing Motion was dictated and the foregoing proceedings were had in connection with said Motion in the presence of the Court and all Counsel in this case; and I further certify that this transcrip of said Motion and proceedings is true and correct.

WITNESS my hand at Galveston, Texas, this 18th day of December, A. D. 1969.

MARY E. McGOWAN
Official Court Reporter,
56th District Court,
Galveston County, Texas

EXTRACTS FROM REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

[118][1] W. L. PATTERSON, Signalman

Q. Now tell us what happened on the last load that that crane operator operated that crane that morning. I want you to tell us from the start. Did you or did you not then give him the signal to lower the clam-bucket into the inshore side of No. 5 hatch?

A. Yes, sir, I did.

Q. I am talking now about the last load just before Mr. Rorie was injured. Did you give him the same signal as you described to us before?

A. Yes, sir.

Q. Did he follow the same procedure?

A. Yes, sir.

Q. Did you give him a signal to stop?

A. Yes, sir.

Q. Did he stop?

A. Yes, he did.

Q. Tell us what happened next.

A. You mean the load that he came into get when Mr. Rorie got hurt?

Q. Right. Now, you testified you gave him a signal. He came down and stopped?

A. Yes, sir.

Q. Now, what happened next?

A. Well, out of the clear blue sky the bucket started swinging, and—

Q. Well, it swung. What did it hit?

A. It hit the stanchion ladder and the stanchion in the middle [119] of the ship.

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1. All of the above numbered pages refer to Reporter's Statement of Facts.

Q. Then what happened?

A. It ricocheted, hit the cargo ore that was back there and—

Q. Did it ricochet again then?

A. Yes, sir, and Mr. Rorie was pinned under it.

Q. Did you see Mr. Rorie just immediately before he was pinned or struck by that?

A. Yes, sir.

Q. By that clam-bucket?

A. Yes, sir, I did.

Q. Where did you see him? What did you see him do?

A. I saw him running, climbing cargo boards.

Q. Climbing the sweat boards or the cargo boards?

A. Sweat boards, yes, sir.

Q. All right. Then did you give the crane operator, Mr. McPeters, a signal, any kind of a signal, after you gave him the signal to stop and he did stop the bucket?

A. No, sir, I did not.

Q. Do you know what caused him to swing that bucket after that?

A. No, sir, I do not.

Q. Was this swinging of the bucket slow or was it sort of wild and fast?

A. Well, it was rapid, wild.

Q. Now, you made a movement with your hand back and forth. Is that the way it looked to you?

A. Go that way and back this way, and that was it.

Q. Now, you say it went this way. You took your left hand and [120] gave a movement to your right. I am sorry. Took your left hand and made a movement to your left and back to the right. Is that the way it went?

A. Yes, sir.

Q. Now, when it went, first, I believe you testified that it hit the steel stanchion and the ladder. Is that right?

A. Yes, sir.

Q. In the center of the hatch?

A. Yes, sir.

Q. And then it ricocheted into some cargo?

A. Yes, sir.

Q. Ore. Then ricocheted again and it went down toward the direction where Mr. Rorie was climbing?

A. Yes, sir.

Q. When you saw Mr. Rorie and before it hit him, he was climbing, trying to get out of the way?

A. Yes, sir.

Q. Now, then, when that clam-bucket hit him what did you do? What did you see happen to Mr. Rorie? Let me put it that way.

A. Well, I just saw Mr. Rorie collapse and start yelling like he was in pain.

Q. What did you do? Did you run to him?

A. No, sir. I said, 'Hold everything.'

Q. 'Hold everything.' Who went down to see him, do you recall? If you remember,

A. I believe Jimmy Cox went down.

* * *

[251] C. V. RORIE

Q. All right. I want you to tell this jury what is the first thing that attracted your attention to that clam-bucket just before it hit you?

A. Well, I was standing, leaning up my back to the cargo-boards, waiting for the bucket to come in. I heard it always, kind of humming as he brought it over, and the first thing I knew the bucket hit the ladder and upright center-line stanchion just below the 'tween-deck, and

fire flew. I turned around to go up the cargo-boards, and the next thing I know they was taking me out of the hold of the ship.

Q. Can you positively tell the jury the position that you were in at the time that bucket hit you?

[252] A. Well, I was trying to get up the cargo-boards.

Q. Well, my question is: Can you tell the jury what position you were in; which way were you facing?

A. I was facing—I had turned around to go up, facing the side of the ship, the skin of the ship.

Q. Just before you got hit do you know which way you were facing?

A. No, sir. That is—I just was going up the cargo-boards. I don't know exactly. That is the first thing I do, I reckon, when something happens is try to get up above it.

Q. When you saw that clam-bucket hit the steps or the rungs of the ladder did you have any idea there which way that bucket might come?

A. No, sir. I sure didn't.

Q. So that the jury may know what we are talking about, I believe you testified that there was a separated bulkhead, separating the offshore side from the inshore side right in the middle, is that right?

A. Yes, sir.

Q. What method was there supplied by the ship if you wanted to get up from the lower hold to the 'tween-deck above?

A. A ladder. There was a ladder on the center line right here (indicating), a ladder that went up.

Q. So, attached to that very wall that separated the offshore side from the inshore side on the forward part, there was a straight up-and-down, steel ladder?

A. Yes, sir.

[253] Q. It had rungs in it?

A. Yes, sir.

Q. And that was probably put there so there would be a means for seamen, longshoremen or anybody who had any business to get up and down it?

A. Yes, sir.

Q. Did you have any idea or any warning that that bucket was going to come in that way?

A. No, sir, I sure didn't.

Q. Did it come in that way, in fact, at all that morning?

A. No, sir.

Q. When that bucket hit you, tell us exactly what happened to you, if you knew what happened to you, or just what happened.

A. Well, the bucket got me. The best I remember I could feel of it kind of pull on my pants, and about that time it raised up and I turned loose and I fell down in on the ore in there in the long corner. I mean I don't know. I don't actually know what happened. I know it got me.

Q. Were you at that time smack up against the skin of the ship, as close as you could get against the skin of the ship?

A. Yes, sir. I was going to climb the sweat-boards.

Q. The only thing what separated you from the skin of the ship were the sweat-boards or cross-battens?

A. Yes, sir.

* * *

OBJECTIONS TO EVIDENCE

[358] MR. McLEOD: Your Honor, at this time we would like to offer into evidence this tariff.

COURT: All right, show it to Mr. Goller first.

MR. MANDELL: I have seen it, Your Honor.

COURT: Do you have any objections to it?

MR. MANDELL: Yes, Your Honor.

COURT: Does Plaintiff have any objection to the exhibit being received in evidence?

PLAINTIFF'S BILL OF EXCEPTION NO.

MR. MANDELL: Let me look and see if it is the same thing that he gave me. Your Honor, we object to the introduction of Defendant City of Galveston's Exhibit No. 1 in so far as it affects Plaintiff's cause of action, because we have no knowledge of it and are not bound by it, and, moreover, nothing in it could possibly bind Plaintiff. There are some provisions in there, so far as Plaintiff is concerned, that would be contrary to public policy.

COURT: I don't know whether they affect you or don't, Mr. Mandell.

MR. McLEOD: Your Honor, we offer it against all parties and for all purposes, because it does create the arrangement between us and the stevedore in this case, and Mr. Mandell's client is affected by it, as well as for other reasons.

MR. MANDELL: Any arrangement, Your Honor, between the Galveston Wharves, the City of Gal-

veston and the Stevedoring Co. to which Plaintiff was not a party, had nothing to do with it, could not be binding on him, and we object to it so far as Plaintiff is concerned.

MR. GOLLER: Your Honor, on behalf of Strachan Shipping Co. we object [359] to the tariff on the unilateral instrument. It is not a contract binding upon Strachan Shipping Co. As far as being in the contractual area, if it should be construed as a contract it is a contract under business compulsion and, therefore, not binding upon Cross-Plaintiff Strachan Shipping Co.

COURT: I overrule both of your objections. It will be received in evidence. If it doesn't affect Plaintiff, it doesn't affect him, but I will admit it at this time.

(Said Galveston Wharves Tariff Circular No. 4-B, marked as Defendant Galveston's Exhibit No. 1, under Court order, accompanies this S.F. Admitted in its entirety at 480.)

MR. GOLLER: Note our exception.

MR. WILLIAMS: Your Honor, we for the record would like to object to it in so far as it affects the vessel or her owners, because we don't think it is material to any issue concerning these two defendants whom I represent.

COURT: I overrule the objection. It will be received in evidence.

MR. WILLIAMS: Note our exception.

MR. MANDELL: Note our exception.

MR. McLEOD: Mr. Robinson, will you please read to the jury Item 97 of that tariff?

MR. MANDELL: What page?

A. Page 5.

PLAINTIFF'S BILL OF EXCEPTION NO. ____

MR. MANDELL: Particularly, Your Honor, we call your attention to provision 97. The particular objection to that provision is as far as it affects Plaintiff, and we ask the Court to instruct the [360] jury that it does not affect Plaintiff. It deals primarily with relationships between the City of Galveston and Galveston Wharves with the Stevedoring Co. It should not and can not bind Plaintiff.

COURT: I overrule the objection at this time.

MR. MANDELL: Note the exception.

COURT: You will read it Mr. Robinson.

A. This item, Item 97, of Tariff 4-B is headed "Lessee Responsibility," and I quote.

MR. GOLLER: I am going to object to this particular provision as well on the grounds it is an unconstitutional provision, and I re-urge my motion made at the beginning

of the trial, that the tariff is not binding on Strachan Shipping Co. as a matter of law.

Mr. McLEOD: Your Honor, it is a tariff filed. It has never been attacked. If they thought it was an invalid instrument they should have gone before the Federal Maritime Commission and attacked it. It covers part of the tariff concerning this crane in question. It is a valid tariff, and we think it creates a relationship between the stevedore and the Wharves that determines under whose control and whose supervision the crane operates was working at the time of the accident in question, and it was plead both as a defense to Mr. Mandell's petition and as part of our cross-action.

COURT: I am particularly interested in the statement it is unconstitutional.

MR. GOLER: Yes, Your Honor. I have a number of cases I . . .

* * *

[410] HERMAN ERMIS

DIRECT EXAMINATION

By Mr. V. W. McLeod:

Q. State your name, please.
A. Herman Ermis.
Q. Where do you live?
A. 3905 L.
Q. That is here in Galveston?
A. Yes, sir.

Q. How long have you lived here in Galveston, Mr. Ermis?

A. I think since 1941.

Q. By whom are you employed?

A. I am employed by Galveston Wharves.

Q. In what capacity are you employed by the Galveston Wharves.

A. Well, I was on the extra board for about 12 years, and in the last four years I have been a steady operator.

Q. This is a suit involving an accident that happened down on Pier 14 on September 6, 1940.

MR. MANDELL: 1960.

MR. McLEOD: I mean 1960, involving Mr. C. V. Rorie. I will ask you whether or not you were down on Pier 14 at that time.

A. Yes, sir, I was.

Q. What kind of work were you doing then?

* * *

Page 411, Line 1-14

A. Well, at that time I was called a fireman on the Brown hoist.

Q. What is a fireman? What are his duties?

A. Well, when we had a steam rig we were firing. Then we switched to Diesel, but we were called firemen until 1962 or 1963. We have changed.

Q. What did they change the name to?

A. Helper.

Q. To helper?

A. Yes, sir.

Q. Back on September 6, 1960, were you employed as a helper or as a fireman on this crane operated by Mr. McPeters?

A. Well, I was his helper.

Q. And who operated this crane?

A. Frank McPeters.

Page 411, Line 17-21

Q. Mr. Ermis, what kind of crane was Mr. McPeters operating on the day we have been talking about, September 6, 1960?

A. It is a locomotive crane called the "Brown hoist."

Q. Do you remember the number of it?

A. No. 8.

Page 416; Line 13-27:

MR. McLEOD: Mr. Ermis, I will hand you what has been introduced as Defendant Galveston's Exhibit No. 8, and I am wondering if there is some way you could come over and show the jury where the operator sits and where the levers are. Can you all see that? The picture is not very large. (Witness stood in front of jury.)

A. That is the seat right here. This is the brake lever, and this is the clutch lever. We have two clutch levers and two brake levers. One is a forward brake, and one is a hand brake. The clutch—one is for the left hand and one is right hand.

Q. Then come back over here and I will ask you some questions about that. (Witness returned to the witness chair.) You have told us, I believe, that there are two levers on the right-hand side of the operator.

Page 417:

A. That's right.

Q. What are those two levers for?

A. One is your hand brake to hold your bucket when you change over to your closing line, you see, because you couldn't hold the bucket open—I mean closed if you use just one line. There is two lines on it, two cables, and you just switch over, throw this one back and step on your lever line, and it will hold the bucket. Then when you dump it you pull your hand brake, hold it with the hand brake, and you hold your foot brake, lock it, and the bucket opens.

Q. I will ask you whether or not the purpose of the brake is to keep the line of the bucket attached to it from falling down to the ground or the deck.

A. Yes, sir; that is what it is there for.

Q. We have talked about the two levers on the right. Do you also have two levers on the left?

A. Yes. There is a swing lever and your lever to pull your clutch in.

Q. What is the swing lever? When you use that, what is the purpose of that?

A. Move the boom.

Q. And does that or does it not cause, if you have a clam-bucket on it, the bucket to swing?

A. Yes, sure, the bucket will swing with the boom.

Q. What is the other lever for? You told us about the swing lever. What is the other lever?

A. That is to pull your clutch in. You run your engine, and . . .

Page 418, Line 1-3:

the bucket closes. You run the engine until you get the air to working, then step on that, turn over; turn loose, and empty the bucket.

Page 422, Line 2-14:

Q. No, not when you are dropping it, but say you want to swing it, is there any lever you can pull that will pull it up higher than this 3 or 4 feet you are talking about?

A. Yes, sir. That is your clutch lever.

Q. What does your clutch lever do?

A. One will jerk it back, and the lever line will close the bucket.

Q. That lever you pull to jerk the bucket, what happens to the bucket if it is swinging and you pull that lever?

A. The hand brake it will stop it.

Q. It will stop it?

A. Yes, it will stop it, not from swinging, but stop it from going down.

Page 424, Line 7-9:

Q. Mr. Ermis, whom was Mr. McPeters employed by on September 6, 1960?

A. Galveston Wharves.

Page 424, Line 15-27:

Q. Whom was he employed by on September 6, 1960?

A. Galveston Wharves.

Q. When a crane operator receives a signal from a signalman, who operates the lever?

A. The operator is the one that takes the signal.

Q. Who operates the Clutch?

A. The operator, the same man.

Q. And who operates the brake?

A. The same man.

Q. Now, then, have you ever seen a longshoreman get into the cab and operate a Wharf Company crane?

A. No, sir.

Q. Or locomotive crane?

[425] A. No, sir, not a longshoreman.

Q. You wouldn't let him do it, would you?

A. No, sir.

Q. Sir?

A. No, sir.

Q. If you were a crane operator and some gang foreman would say, "Let me operate that crane for a little bit," would you let him?

A. Crane foreman?

Q. No, a gang foreman or a longshoreman.

A. No, sir.

Q. From time to time these cranes break down, don't they?

A. Well, they break down, sure.

Q. And who fixes them?

A. Well, when it is out on the job and we can't fix it, we send it to the roundhouse, and a machinist fixes it.

Q. Do you let any of the longshoremen of the gang fix your crane?

A. Not that I know of.

Q. You have never seen it done?

A. No, sir.

Q. And if some longshoreman would come up and say, "Let me fix it," you wouldn't let him do it, would you?

A. Not fix the crane. They would hook a line to the block or the bucket.

Q. Just to help pick something up, but I am talking about fixing the machine.

A. No, sir; no, sir.

Page 428, Line 9-22:

Q. Then you try to swing that bucket, do you not, so that it wouldn't hit, say, the bulkhead or the ladder? You have seen those ladders right in the center of the hatch?

A. Yes.

Q. You try hard not to hit it, don't you?

A. We don't see it. It is the signalman's duty to know how to lower it so we don't hit it.

Q. Well, all the signalman can do is tell you to lower?

A. All he can do is watch that man up there.

Q. All he can do is tell you to lower it?

A. Lower it, bring it up, and swing it.

Q. And the boom is so spotted, is it not, that it would not hit any portion of the ship, is that right?

A. That is correct.

Page 430, Line 5-27:

Q. And the way that is done is that the crane operator, by his controls, can pay out the cable so it will go all the way down?

A. You use your hand brake and watch the signalman and let it down slow.

Q. Well, the points I am making is that the one who controls the crane operator, who controls the clam-bucket, has enough cable there and it is long enough to reach all the way down to the bottom of No. 3 hold?

A. Yes, sir.

Q. If in this instance there were only two holds, the 'tween deck and the next hold, then you have plenty more cable in there than you actually use?

A. Well, I think 120 foot or 220 foot.

Q. Over 100?

A. About 100 to 220 foot, something like that. On the Brown Hoist we use a 180 foot cable.

Q. So that how far that bucket would go depends on how much length of cable you have got?

A. Yes, sir.

Q. If you give it more cable and you swing it, it will swing as much cable as it has?

A. You never turn that cable loose.

[431] Q. You shouldn't, should you?

A. No, sir.

Q. But you got that cable to turn it loose if you want to?

A. Sure. We have to give out enough cable to go as far as we want. If you let your foot off that cable, every load you put on there you will ravel it up.

Q. You are in bad shape?

A. Bad shape.

Q. Evidently, the crane operator is the only one that can control the speed with which the clam-bucket is lowered?

A. Yes, sir.

Q. The crane operator is the only one that can control how much cable he will pay out?

A. Yes, sir.

Q. The crane operator is the only one that can operate the brake or the clutch?

A. Yes, sir; that's right.

Q. Now, then, if a crane operator properly operates his machine and the boom is properly spotted the clam bucket will not hit any portion of the bulkhead or the ladder with so much force as to swing back and swing again and hit the one and then ricochet up against the side of the ship, will it?

A. Well,

Q. Did you understand my question?

A. I didn't quite get you.

Q. All right; I will repeat it slowly. If the crane operator properly operates the levers and the machine is in good [432] working condition, the clam bucket will not hit the side of the vessel at the lower hold of the vessel or the ladder with so much force as to cause it to swing back and then swing back again underneath forward underneath, and hit the one and ricochet against somebody, will it?

A. I wouldn't think so.

Q. No, sir. It has to be that either the crane operator improperly handled the crane or there was something wrong with the crane if something like that does happen.

MR. McLEOD: Your Honor we object because he hasn't put in the other factor of the crane being improperly spotted by the signalman.

MR. MANDELL: Your Honor this is cross-examination.

COURT: I overrule the objection.

MR. McLEOD: Note my exception.

MR. MANDELL: Did you understand my question, sir?

A. If the signalman in that case gives him the right signal, it will always hit where he wants it.

Q. Sir?

A. If the signalman gives him the right signal and he drops it, it should hit right.

Q. But my question was: If the crane was in good working condition and the operator properly operates that thing and the signalman gives him a signal to come on down, and if he comes down properly, that thing will not hit the ladder or on the bulkhead so hard as to swing back, swing forward, and hit the ore and ricochet?

A. Not if—if he goes down and the signal was given him, then he is the man that controls it.

Q. Who controls it?

A. The signalman. He can't see through that iron, no, sir.

Q. Is there any person besides the man at the control of that crane who can make that thing swing as hard as he wants to? Is there anybody else except the man who operates the controls?

A. Not as long as he is not at the controls he can't.

Q. The man at the controls is the only man who can?

A. That's right.

Page 435, Line 4-16:

Q. That crane is a regular locomotive, isn't it?

A. Yes, sir.

Q. It is a very complicated and expensive piece of machinery, isn't it?

A. That's right.

Q. The body of the crane itself moves? The crane itself sits on a railroad car like, with railroad wheels, and it fits on a railroad track?

A. Well, it is called a table. We have it on a wheel—we call it a "bull wheel"—and it has four rollers underneath, and you can turn it around.

Q. You can turn it completely around?

A. Yes, sir.

Page 437, Line 9-27:

MR. MANDELL: Do you gentlemen who are operators of these hoists have a supervisor?

A. Yes, sir, we have a supervisor.

Q. Who was the supervisor in 1960? Who was the supervisor when Mr. Rorie was hurt?

A. Johnnie Johnston.

Q. Does he come around from time to time to see how the work goes on?

A. Yes, sir.

Q. And he is the one that has the authority to tell you how to go about operating your crane?

A. Well, to some extent he has.

Q. Well, if he finds something that you don't operate just right, he is the one that could tell you about it and talk to you about it?

A. That's right.

Q. And if there is something wrong with a crane that you feel that you need to report to somebody higher than you, he is the man that you report to?

[438] A. That's right.

Q. And he is the man who sends somebody to have it fixed if it needs special attention or orders it to be taken back into the roundhouse?

A. That's right.

Q. Mr. Ermis, you don't belong to the Longshoremen's Local, do you?

A. No, sir.

Q. You do not get your job through the Longshoremen't Local, do you?

A. No, sir.

Q. As a matter of fact, you are a member of the Brotherhood of Maintenance of Way Employees, aren't you?

A. Yes, sir.

Q. And they are the folks that represent you in bargaining with your employer, is that correct?

A. Yes, sir.

Q. Your union has an agreement, written agreement, with the Wharf Company, the City of Galveston, covering the conditions and wages of your employment?

A. Yes, sir.

Q. Mr. Ermis, you were kind enough yesterday to explain how that bucket is swung underneath the hatch—I am sorry—underneath the 'tween-deck so that the cable actually comes close to or in contact with the coaming of the 'tween-deck.

A. That's right.

Q. Isn't that correct?

A. Yes, sir.

Q. I wish you would answer out loud, because this lady here, the Court Reporter, doesn't look at you.

A. Yes, sir.

Q. You, as an experienced operator of a hoist or crane, wouldn't want anybody so close to, so near, the bucket where it swung that the bucket would hit him, would you?

A. No, sir. I wouldn't.

Q. That would be a very unsafe practice, wouldn't it?

A. Yes, sir.

Q. Answer out loud.

A. Yes, sir.

Q. In fact, it would be dangerous, would it not?

A. Yes, sir, it would.

Page 446, Line 7-27:

Q. When they are using the snatch-block there is no reason to throw the bucket over?

A. That's right.

Q. They can pull it over with the snatch-block?

A. Yes, sir.

Q. That is the whole purpose of the snatch-block, so they can lower the bucket down and the snatch-block can pull it?

A. Yes, sir.

Q. So you don't have to throw the bucket if they have it rigged to a snatch-block?

A. No, sir, you don't.

Q. Now, you have seen that snatch-block arrangement used many times, have you not?

A. Yes, sir, I have.

Q. Was there anything at all that appeared to you to be unusual about that operation that morning up until the time this accident happened?

A. No, sir.

Q. It was going along just like you had seen it done many times before?

A. That's right.

Page 451, Line 11-27:

Q. Where is this man you say was the supervisor at that time, Mr. Johnston, if you know?

A. He has retired. I think he retired about two years ago.

Q. Would he normally come down there in the morning and kind of line out the work he wanted done, or did you just know your own jobs and set it up yourselves?

A. In fact, he was sitting in his car and looking right at it when the job was

Q. When the job was what?

A. When we were working.

Q. On that day, you mean?

A. Yes, sir. He was right there, just a little ways off, watching the work.

Q. As far as you could tell, he could see just the way McPeters was operating that crane?

A. Yes, sir.

Q. I mean there was nothing to keep him from seeing, was there?

A. No, sir.

Page 454, Line 13-27:

Q. Well, a skilled operator can operate the bucket so that it goes down in the hold as slowly as he wants to, can he not?

A. Yes.

Q. And if he picks the bucket up he can operate it so he can pick it up slowly?

A. Yes, sir.

Q. When he swings it across the ship, he can operate it as slowly or as fast as he wants?

A. Yes, sir.

Q. The machine is so designed that he can put that bucket in wherever he wants it just as easily as he wants to; isn't that right?

A. Yes, sir.

Q. I believe you said the clutch lever is the one that controls the swing of the boom.

Page 455, Line 1-16:

A. No, sir, not the clutch lever; the swing lever.

Q. If you use that lever and swing the bucket into the hold and want to move it over 4 feet, you can boom it over 4 feet, can't you?

A. Yes, sir.

Q. And practically set it down in the center of the ship, that is, I guess, if you want to do it?

A. Sure.

Q. So if the bucket was brought down here just inside the forward hatch coaming of the ship and you wanted to move it over just as close as you could to get a fall wire close to this coaming, you could do it very slowly?

A. Yes, sir.

Q. And set it down there or hold it or suspend it any way you want to do it?

A. Yes, sir.

Page 456, Line 15-27:

Q. Mr. Ermis, I don't recall whether you have been asked questions about this or not, but to your knowledge no one operates the City of Galveston's cranes other than City of Galveston employees; isn't that right?

A. That's right.

Q. And you don't have any longshoremen that are employed by the stevedoring companies in the cabs of the cranes to operate the levers to control the crane at any time, do you?

A. No, sir.

Q. You don't allow the stevedoring companies' employees to do any of the maintenance on the cranes whatsoever?

A. No, sir.

Page 460, Line 17-27:

Q. And under no circumstances should the operator operate the hoist where the bucket would hit a ladder and swing back and then swing back again; no one should operate a crane that way?

A. I guess if it hit something it would.

Q. Well, that's right. It would hit back, would it not? It would swing back?

A. It would probably swing twisted up.

Q. And start turning around, but how far that thing would go back and how far it would go forward again would depend on how fast you operated?

Page 461, Line 1-3:

A. Well, I guess it would.

Q. Sir?

A. I guess it would.

RELEVANT TESTIMONY OF W. H. SANDBERG CITY'S WHARVES MANAGER

Page 466, Line 9-27:

Q. Mr. Sandberg, was it you or your office that conducted the negotiations with Texas Railway—

A. Maintenance of Way employees?

Q. Yes.

A. It is done on a national basis.

Q. Involving many railroads?

A. That's right.

Q. To which the Galveston Wharves, or the City of Galveston through the Galveston Wharves, becomes a party to the contract?

A. That is correct.

Q. And it governs conditions of employment?

A. That's right.

Q. Wages?

A. That is correct.

Q. Vacation fringe benefits?

A. That is correct.

Q. And all of these come to your employees by reason of their employment with the City of Galveston?

[467] A. That is correct.

Q. And they are the object of many, many instruments and addenda from time to time?

A. You mean the contract?

Q. Yes.

A. Yes.

Q. And Galveston Wharves or the City of Galveston is a signatory to these agreements covering the employees who operate locomotives or hoists?

A. They become a party to the Maintenance of Way by agreement, and we are signatories to the Maintenance of Way agreement, which includes hoist operators.

Q. In other words, there are some other employees who come under this agreement?

A. That's right.

Q. The employees operating the crane or the hoist are paid directly by the City of Galveston through the Galveston Wharves, is that correct?

A. That is correct.

Q. They look to the City of Galveston through the Galveston Wharves for their payment for whatever work they do?

A. They look to the Galveston Wharves for their payment.

Q. Which is part of the City of Galveston?

A. Well, it is part of the City of Galveston, but I doubt very seriously whether the City of Galveston would ever aid them out of their funds.

Q. Then, they have overtime schedules?

[468] A. They do.

Q. Have vacation plans?

A. They have.

Q. Retirement benefits?

A. Under the Railroad Retirement Act.

Q. That, of course, has an indirect relationship to the work they do for the Galveston Wharves?

A. That's right.

Q. It is the Galveston Wharves that maintains and has the duty to maintain these hoists so they would be in proper working condition?

A. That's right.

Q. The operators who run them are directly responsible to their supervisor or foreman, whatever you may call him?

A. That is correct.

Q. No one but a regular employee employed as an operator of the Brown hoist will be permitted to operate hoists whenever they are working?

A. That is correct.

Q. No one but an employee of the Galveston Wharves will be permitted to repair or maintain these hoists, except

an employee of the Galveston Wharves who is qualified and employed for that purpose?

A. That is not correct.

Q. Who would?

A. We can contract out.

Q. Either an employee would do it or someone that the Galveston Wharves would designate by contract?

A. That is correct.

Q. A stevedore may have the use of this property and no obligation or duty to repair; he would not be permitted to repair or attempt to repair or maintain this hoist?

A. That is correct.

Page 470, Line 17-27:

Q. What about rail cranes? Have any of the stevedores been able to put rail cranes on?

A. You mean stevedores?

Q. Yes, sir, other than Galveston Wharves cranes.

A. None have ever used a locomotive crane.

Q. That is what I mean.

A. To my knowledge, no. It wouldn't be practical, because they would have to bring them from some location. By the time they paid switching charges and rail charges it would be prohibitive.

Q. Pier 14 is served by a railroad track where locomotive cranes

Page 471, Line 1-2:

are normally used?

A. It is not accessible to close-track or rubber-tired cranes.

Page 475, Line 17 and 18:

Q Mr. Sandberg, do you know the approximate cost of a Brown hoist No. 8?

Page 475, Line 27

COURT I overrule the objection if you know, Mr. Sandberg.

Page 476, Line 1 :

you may answer.

A They run between $75,000.00 and $100,000.00.

Page 476, Line 10 :27:

Q Mr. Sandberg, possibly it has been asked before, I am not sure but I want to ask you whom these men that operate the cranes; and the oilers, are employed by. There is no doubt about it that they are general employees of the City of Galveston; isn't that correct? They are on the City of Galveston's payroll?

A. No, the Board of Trustees of the Galveston Wharves.

Q. Is that not a part of the City of Galveston?

A. Yes, that's right.

Q. So, in effect, they are paid by the City of Galveston, whether it comes out of the Galveston Wharves' funds or the City of Galveston's funds?

A. That's right.

Q. Their salaries are subject to deduction for Social Security taxes and retirement?

A. All employees of the Galveston Wharves come under railroad retirement.

Q. They deduct that in lieu of Social Security?

[477] A. That's right.

Q. And Federal income taxes are withheld by the City of Galveston or Galveston Wharves?

A. That is correct.

Q. Do they not get paid vacations by their employer?

A. They do.

Q. And they have hospitalization benefits?

A. They do.

Q. And the only person or legal entity having the right to hire or fire one of these operators would be their supervisors that are also employees of the City of Galveston?

A. That is correct.

Q. So if you had an incompetent operator, one that didn't measure up to standards, who would be the only one I am talking about the City again with authority to fire him?

A. We would have the only authority to fire the man.

Q. When one of these cranes goes out on a job, the person using it, whether he be a stevedore or some equipment, has to take the operator that you furnish?

A. If he takes one of our cranes, yes.

Q. And he has to take him as he finds him? He can't give him any directions or control over the operation of that machine other than have him follow the signals of a flagman?

A. Once he is employed by that stevedore he takes on orders from that stevedore.

Q. And the stevedore doesn't tell him how to operate the levers or controls of the machine, does he?

[478] A. Again we are talking about the handling of that crane?

Q. Yes.

A. He doesn't tell him what lever to pull.

Q. Other than taking signals from a flagman, everything that the crane operator does on that job he is doing for the City of Galveston? He decides how fast to swing it out, what lever to pull to swing that boom right or left, does he not?

A. That's right.

Q. Nobody from the stevedoring company is up there in the cab looking over his shoulder and telling him how to operate the machine?

A. No, sir.

Q. These operators, I presume, are trained by the Galveston Wharves.

A. Sometimes they are trained when they come to us. They have had experience with other people and served their apprenticeship.

Q. At least, they are qualified operators in their jobs, is that correct?

A. That is correct.

Q. You wouldn't entrust your new cranes to the average longshoreman that they get over at the union hall, would you?

A. No.

Q. Do you know how long it takes to train a crane operator before you turn him loose to operate on his own?

A. No, I don't.

Page 479, Line 1-5:

Q. Do you have a training program for them in the City?

A. Yes, we have one. Of course, it depends on the men. Some men learn more rapidly than others, learn faster than others.

Q. Oh, they train them on the job, then?
A. Yes.

[480] OBJECTIONS TO EVIDENCE

COURT: Mr. McLeod, I am ready to rule on these other things.

MR. WILLIAMS: As I advised the Court in so far as that exhibit is concerned we objected prior to the Court's ruling.

COURT: This is Defendant's Exhibit No. 1, which I had previously admitted in evidence, and additional objections were made to Sec. 97. I now overrule all objections and admit it in evidence in its entirety. (Marked at p. 356). Previously admitted at p. 359.

MR. WILLIAMS: May the record reflect that we join in each and all of the objections made by Strachan Shipping Co. to the admission of that document?

MR. GOLLER: For the record, note our exception.

MR. WILLIAMS: Note our exception.

COURT: Note everybody's exception. Mr. McLeod you wanted to read it the other day. You may do so at this time.

MR. McLEOD: Thank you, Your Honor. Item No. 97 of Tariff Circular No. 4-B provides:

"When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.

"It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters."

* * *

FRANK GARCIA, a witness for Strachan Shipping Co., Cross-Defendant and Cross-Plaintiff, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Theodore Goller:

Q. State your name, please.
A. Frank Garcia.
Q. Where do you live, Mr. Garcia?

A. 2014 - 39th Street.

Q. How long have you lived in Galveston?

A. Oh, 60 years.

Q. Is that your age, 60 years?

A. Yes, sir.

Q. What is your occupation, Mr. Garcia?

A. I am a foreman.

Q. Foreman of what?

A. Ship foreman on the docks.

Q. For longshoremen?

A. Yes, sir.

Q. How long have you been engaged in longshoring work?

A. About 40 years.

Q. And where have you performed work as a longshoreman?

A. On the docks in Galveston.

* * *

[503] Q. Mr. Garcia, in your experience on the waterfront, and I understand you had 13 years as walking foreman with Strachan and some 11 years with Texas Transport & Terminal Co., have you ever seen any crane used in a stevedoring operation at the Port of Galveston other than a crane owned by the Galveston Wharves or the City of Galveston?

A. No, sir.

Q. Have you ever seen any crane operated on the waterfront other than with an operator supplied by the City of Galveston?

A. I didn't quite understand you on that one.

Q. I said Have you ever seen any crane, in your experience, operated on the waterfront by an operator other than one employed by the City of Galveston?

A. No, sir, I haven't.

Q. Do you know of your own knowledge whether any cranes belonging to outsiders have ever been used in this port?

A. No, sir.

* * *

JOHN W. CAIN, a witness for Strachan Shipping Co., Cross Defendant and Cross Plaintiff, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Theodore Goller:

Q. State your name, please.

A. John W. Cain.

Q. Where do you live?

A. 511 Avenue C, La Marque.

Q. What is your occupation?

A. Operating Engineer for the Atlantic & Gulf Stevedores.

Q. How long have you been so employed?

[504] A. Eighteen years.

Q. Do you do any other work in addition to that?

A. I was independent marine surveyor and marine consultant.

Q. Can you give us a little of your background? Tell us how you got to be operating engineer for Atlantic &

Gulf Stevedoring, marine surveyor and your experience at sea if you had any.

A. I started going to sea on American vessels in 1936. I sailed till I came ashore in Galveston in 1948. I have sailed in most capacities from ordinary seaman to master.

Q. Do you hold any license?

A. Yes, sir. I have a fourth issue of master's license, first class, and pilot at San Juan, Nicaragua.

* * *

[578] Q. Have you, since 1954, after you were promoted to manager of Atlantic & Gulf here in Galveston, been manager of Atlantic & Gulf here in Galveston, been actively engaged in stevedoring work?

A. Yes, sir.

Q. Do you still go on ships and still supervise loading?

A. Yes, sir.

Q. Do you order cranes in the day and time for use when discharging ships?

A. Oh, yes.

Q. Whom do you obtain them from?

A. Galveston Wharves.

Q. Have you ever obtained any cranes for discharging vessels in the Port of Galveston since you have been here from anyone other than Galveston Wharves?

A. No, I haven't.

Q. Then, I take it—well, let me ask you this question. Has Atlantic & Gulf used any shore-based cranes in the Port of Galveston since you have been here that you have obtained from some source other than Galveston Wharves?

[579] A. No. The only cranes I have been using in operations in Galveston have come from Galveston Wharves.

Q. What about cranes for heavy lifts, barge type cranes, have you used those?

A. I have used them, but there isn't any in Galveston. It has been quite some time back.

Q. Galveston Wharves doesn't have those for rent?

A. No, Galveston Wharves doesn't have those.

Q. Have you ever been able to rent from Galveston Wharves one of these mobile cranes that does not operate on railroad tracks, rubber tired cranes?

A. Not to my knowledge.

Q. Sir?

A. I saw one yesterday.

Q. Where?

A. Out at 33rd Street.

Q. Where was it working?

A. Across from the cotton shed.

Q. Was it working on a railroad track?

A. No. It was a Lorain rubber tired crane.

Q. To your knowledge, have there been any cranes working in the Port of Galveston where railroad tracks are in existence that are not owned and operated by the Galveston Wharves?

A. No.

Q. Have you seen any cranes working in areas in the Port of Galveston where there was no trackage, railroad trackage?

A. Yes, I have seen them working on Pier 26.

[580]. Q. When was that?

A. About two weeks ago.

Q. There were no tracks on Pier 26?

A. No, no tracks on Pier 26.

* * *

[6011] REDIRECT EXAMINATION

By Mr. Theodore Collier

Q. I have one or two questions, Your Honor. Captain Cain, you testified in response to one of Mr. McLeod's questions that you saw a rubber tired crane at Pier 39

A. Yes, some time back.

Q. How long back, back a couple of years ago?

A. I don't remember the exact date. I guess about November somewhere, October or November of last year.

Q. In 1967?

A. Yes, sir.

Q. Were there any tracks out at Pier 39 where that crane was operated, any railroad tracks?

A. There are tracks there.

Q. Have you seen any rubber tired mobile cranes operating in the Port of Galveston? Did you see any such in 1960?

A. No.

Q. I mean

A. There is a reason. The reason is from what I understand, I told you about Pier 39. The reason a [illegible] crane was used was because a [illegible] could not be used.

Q. Why?

A. Because of the tracks. I understand from [illegible] the tracks were—

MR. McLEOD: Your Honor, we would object to any report. It would be hearsay.

COURT: Only what you know.

[602] A. I do know. I surveyed that ship.

MR. GOLLER: You were marine surveyor on a ship at Pier 39?

A. Yes, sir.

Q. Had they ordered a Brown hoist and were unable to get it?

MR. McLEOD: Your Honor, he is leading the witness.

COURT: I sustain the objection.

MR. GOLLER: Mr. Cain, tell us how you know why they were not using the Brown hoist? And tell us, please, the basis of your knowledge.

A. My ship—I don't remember strictly. I believe the name of the ship was "Sacramento." I was asked to make a survey for the contracting stevedore. A Brown hoist had been down there, and it was described to me in these words—

MR. McLEOD: Your Honor, there again he is saying what was described to him, and I would object to it on the grounds it would be hearsay.

MR. GOLLER: Did you see the Brown hoist come in there and try to come in to the dock?

A. No. The Brown hoist was—it was in the dock, already in the dock.

Q. Was he down where he could reach the ship?

A. Yes, sir.

Q. Was it being used?

A. It had been used, yes, sir.

Q. Well, what part of the ship had it been used on?

A. In No. 2, I believe.

Q. In No. 2 hold?

[603] A. No. 2 hatch, yes.

Q. What part of the ship did you say the rubber-tired crane worked on?

A. That was put in to replace the Brown hoist at No. 2.

Q. At No. 2?

A. Yes.

Q. Were they both working the same side of the hatch, say inshore side or offshore?

A. They were not working together. The Brown hoist was withdrawn and the rubber-tired hoist continued on.

Q. Do you know why the Brown hoist was withdrawn?

A. Yes, sir.

Q. Why was it withdrawn?

A. The condition of the trackage on Pier 39.

Q. It was unsafe for it to work there?

A. Yes, sir.

71-886

Supreme Court, U.S.
FILED
JAN 8 1972
E. ROBERT SEAVER, CLERK

NO._____

IN THE

Supreme Court of the United States

October Term, 1971

STRACHAN SHIPPING COMPANY, ET AL., *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners Strachan Shipping Company and Texas Employers' Insurance Association (hereinafter collectively called Strachan or Petitioners) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas entered on the 28th day of July, 1971.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported in 14 Tex. Sup. Ct. J. 486 (July 31, 1971) and appears in the Appendix hereto (A. 1)[1]

1. Separate Appendix prepared and submitted jointly by petitioners C. V. Rorie, Jr., and Strachan Shipping Company.

The opinion of the Court of Civil Appeals, is reported in 456 S.W.2d 421 (14th Dist. Houston, 1970) and appears in the Appendix hereto (A. 13).

The judgment of the District Court of Galveston (56th Judicial District of Texas) was entered on August 28, 1968, and appears in the Appendix hereto (A. 28). No written opinion was rendered by that Court.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on July 28, 1971. Timely petitions for rehearing were denied on the 13th day of October, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1.

Whether the operator of a port terminal facility required by federal statute to observe just and reasonable regulations and practices in connection with the handling of goods in foreign commerce may lawfully shift liability for its own negligence to the user of its specialized cargo handling equipment by an exculpatory provision in its tariff purporting to make its general employee who operated such equipment the special servant of the user, where a jury expressly found that such general employee was not subject to the user's control and was not the user's loaned servant.

2.

Whether an exculpatory provision in a terminal operator's tariff filed with but not approved by the Federal

Maritime Commission is void and unenforceable where the Commission has expressly stated that acceptance of a tariff by the Commission does not constitute approval of its terms and that the exculpatory provision here sought to be reviewed is not a matter within its jurisdiction.

STATUTORY PROVISIONS INVOLVED

The Shipping Act of 1916, United States Code, Title 46:

§801. *Definitions*

When used in this chapter:

"The term 'other persons subject to this chapter' means any person not included in the term 'common carrier by water,' carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

§816. *Discriminatory rates prohibited; supervision by Board*

"Every . . . other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivery of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

STATEMENT OF THE CASE

This litigation was instituted in the 56th District Court of Galveston County, Texas, by C. V. Rorie, Jr., a longshoreman, to recover damages for personal injuries sustained on September 6, 1960, while working on board the SS ARMAGH at the Port of Galveston, Texas.

He sued Avenue Shipping Co., Ltd., the shipowner, Trinder Anderson & Co., Ltd., the charterer, (hereinafter collectively called shipowner) and the City of Galveston, its Mayor and the Board of Trustees of the Galveston Wharves, the owner and operator of the terminal facilities at the Port of Galveston (hereinafter collectively called City). He sought recovery against the shipowner on the grounds of unseaworthiness and/or negligence and against the City on the ground that his injuries were caused by the negligence of its general employee who was operating a shoreside crane used to discharge bulk ore from the hold of the vessel.

The shipowner and the City filed cross-actions against petitioner Strachan Shipping Company, the stevedore and Rorie's employer, seeking indemnity for any sums they might be required to pay to Rorie as a consequence of his suit. Strachan counterclaimed against both defendants, and its workmen's compensation insurance carrier, petitioner Texas Employers' Insurance Association, intervened to recover compensation and medical payments made to Rorie as a consequence of his injuries on the ship.

Rorie's suit was dismissed for want of prosecution by the trial judge in May, 1966, but was reinstated on appeal and the case proceeded to trial before a jury during April-May, 1968.

The evidence was undisputed at the trial that to discharge the bulk ore Strachan arranged for the use of a mobile railway crane, referred to in the evidence and opinions below as the Hoist, The Brown Hoist or Brown Hoist No. 8, which was owned by the City. In addition to supplying the Hoist, the City supplied an operator (McPeters), and an oiler (Ermis), both of whom were general employees of the City. A supervisor employed by

the City was also present on the wharf in the vicinity of the vessel.

The City contended at the trial that the employment status of the Hoist operator was governed by Galveston Wharves Tariff Circular No. 4-B, which provided in Item 97, as follows:

> "When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.
>
> "It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters."

This provision of the City's tariff was admitted into evidence over this petitioner's objections and was considered by the jury in its deliberations (A. 117-121, 143-144).

The jury returned a verdict finding that Rorie's injuries were caused by the negligence of the operator of the Hoist, and awarded damages of $75,000. The jury also found

that the shipowner was not liable to Rorie for unseaworthiness or negligence and in response to two separate special issues (Nos. 18 and 25) found further that Strachan Shipping Company, the stevedore, did not have the right to direct or control the operator of the Hoist, and that the operator was not Strachan's special or loaned employee (A. 34, 36).

The trial judge disregarded the express findings of the jury that the Hoist operator was not a borrowed servant of the stevedore and entered judgment *non obstante veredicto* on motion of the City that Rorie take nothing from the defendants (the City and the shipowner), and that the shipowner recover from Strachan the sum of $7,500 for attorneys' fees and disbursements incurred in the successful defense of Rorie's suit. All other relief was denied.

The Court of Civil Appeals reversed the judgment of the trial court, and held that the jury's answers to the special issues relating to the loaned servant question were fully supported by the evidence, and that the provisions of the tariff promulgated by the City were not controlling on that issue where the evidence showed that control over the Hoist operator was in fact retained by the City, his general employer.

Nevertheless, the Court of Civil Appeals remanded the case for another trial on the ground that the special issues (interrogatories) by which the jury found that the hoist operator's negligence was a proximate cause of Rorie's injuries constituted a "global submission" under Texas practice.

The Supreme Court of Texas reversed the decision of the Court of Civil Appeals, reinstated the judgment of

the trial court, and held as a matter of law that the exculpatory provision in the City's tariff constituted an agreement of the parties making the Hoist operator the special servant of Strachan Shipping Company, the user of the Hoist.

The Federal Maritime Commission filed a brief *amicus curiae* in the Supreme Court of Texas in which it contended that the Court of Civil Appeals was in error to the extent it implied that the unilaterally established tariff of a terminal operator must be approved by the Commission prior to the time it may lawfully be effectuated. However, the Commission in its brief stated specifically that it took no position with respect to the liability of the City for the injury here involved, since actions for the recovery of damages for personal injuries fall outside of the agency's jurisdiction and do not present any factual questions which require the exercise of its specialized knowledge.

Petitioner raised the federal questions here sought to be reviewed in its First Amended Answer to Cross-action of Defendant City of Galveston and Cross-action of Strachan Shipping Company filed in the trial court by special exceptions to the City's cross-action and as an affirmative defense (A. 75, 77) and also by objection to admission of the tariff provision into evidence (A. 119, 121, 143).

The federal questions were raised by Petitioner in the Court of Civil Appeals by Point No. 3 (and inferentially by Points 1 and 2) in the Brief of Appellant Strachan Shipping Company and by the Reply Brief of Appellant Strachan Shipping Company.

The federal questions were raised in the Supreme Court of Texas by Petitioner's Motion for Rehearing, after that

Court reversed the judgment of the Court of Civil Appeals which had held that the tariff provision was not controlling on the loaned servant issue.

REASONS FOR GRANTING THE WRIT

1.

The Decision Below Decides a Federal Question of Substance Contrary to Applicable Decisions of This Court.

The decision below holding that the operator of a terminal facility (required by federal statute to observe just and reasonable practices relating to the handling of cargo moving in foreign and interstate commerce) may by a unilateral declaration in its tariff shift liability for its own negligence to the users of its specialized cargo-handling equipment is in direct conflict with the decision of this Court in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 99 L.Ed. 911 (1955).

The issues presented by this case are of fundamental importance to the administration of the Shipping Act of 1916 relating to the operation of terminal facilities in the ports of the United States. The effect of the decision is to permit a terminal operator required by federal statute to observe just and reasonable regulations relating to the handling of property,[2] which has been held by this Court to be a common carrier with attendant responsibilities and obligations to the public which it serves,[3] and which is subject to supervision and control by a federal regulatory

2. 46 U.S.C.A. §816; 46 C.F.R. 533.

3. *Galveston Wharf Co. v. Galveston H. & S.A. Ry. Co.*, 285 U.S. 127, 76 L.Ed. 659 (1932).

agency empowered to enforce the statute requiring such regulations,[4] to exercise its monopolistic powers over the users of its facilities in a manner which is contrary to the judicially declared public policy of the United States and imposes an undue burden upon foreign and interstate commerce.

The court below held that the exculpatory provision of the tariff of the City of Galveston constituted an express agreement between the City of Galveston and Strachan that the latter should have the right to control the operator of the Hoist. Despite express findings of the jury (A. 34, 36) that in fact (1) Strachan did not have the right to control the City's general employee, and (2) that he did not become the borrowed servant of Strachan, the court held that the tariff provision was binding upon persons dealing with the City, and that ". . . [I]n these circumstances the tariff is conclusive, and McPeters was the loaned employee of Strachan as a matter of law."

The decision below is contrary to this Court's holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 99 L.Ed. 911 (1955), that similar provisions in a towage contract between the owners of a tugboat and a barge damaged by the negligence of the tug's crew, which provided that the towing movement should be at the sole risk of the towed barge, and that the crew of the tugboat in the performance of said service should become and be the servants of the barge, were against public policy and therefore invalid and unenforceable.

Mr. Justice Black, writing for the majority noted that a release-from-liability clause in a towage contract was

4. *Selden and Co. v. Trustees of Galveston Wharves*, 7 F.M.C. 679 (1964).

held invalid by this Court in 1871 in *The Syracuse*, 79 U.S. 167, 20 L.Ed. 382 (1871), which was decided "in an era of manifest judicial hostility toward release-from-negligence contracts particularly those made by businesses dealing widely with the public and having potential monopolistic powers", and that such hostility had caused the Court to declare that public policy forbade common carriers[5] and telegraph companies[6] to make such contracts.

Speaking of the second clause in the contract, that the employees of the tugboat should be the servants of the barge, which is, in effect, identical to the similar provision in the City's tariff here, the Court said, at 349 U.S. 94:

> "The second clause . . . likewise cannot be enforced. For if valid, the only effect of that clause would be to shift all liability for negligent towage from the towboat to the vessel being towed, precisely what the first clause attempted to do. This is true because employees of a towboat do not become employees of a vessel being towed just because a contract says so, when as here the workers are in truth and in fact solely employees of the towboat. . . . The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be the employees of the towed vessel when the latter 'employment' is purely a fiction."

The quoted language is particularly applicable under the circumstances of this case where after more than two weeks of trial the jury found as a fact upon ample evi-

5. *Railroad Co. v. Lockwood*, 84 U.S. 357, 21 L.Ed. 627 (1873).

6. *Express Co. v. Caldwell*, 88 U.S. 264, 269-270, 22 L.Ed. 556, 558, 559 (1875).

dence (as noted by the Court of Civil Appeals, the final arbiter of questions of fact under Texas practice[7]) that Strachan had no right of control over the City's Hoist operator, and that he was not Strachan's loaned servant. To paraphrase Mr. Justice Black, the jury found here that the " 'employment' is purely a fiction."

Accord *Boston Metals Company v. The SS WINDING GULF*, 349 U.S. 122, 99 L.Ed. 933 (1955) and *Dixilyn Drilling Corporation v. Crescent Towing & Salvage Company*, 372 U.S. 697, 10 L.Ed.2d 78 (1963).

In *Dixilyn* this Court held invalid a provision of a towage contract purporting to make a barge owner liable for all damages arising out of the towage as an attempt by the tower to exempt itself from liability for its own negligence and squarely in conflict with *Bisso*. The language of Mr. Justice Harlan, concurring, is appropriate here:

> ". . . Certainty in the law governing commercial transactions of this kind is an overriding consideration which will not be promoted by opening the Bisso rule to indeterminate exceptions in instances where, unlike Southwestern Sugar,[8] no functions of a regulatory agency are involved."

Petitioner respectfully submits that under the circumstances of this case where the jury found that the alleged employment was fictional rather than factual, and where the evidence also showed conclusively that the City was

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7. Tex. Const. Art. V, §6; Tex. Rev. Civ. Stat. Ann., Art. 1820 (1964); *Gulf, Colorado & Santa Fe Railway Company v. Deen*, 158 Tex. 466, 312 S.W.2d 933 (Tex. Sup. 1958), cert. den. 358 U.S. 874, 3 L.Ed.2d 105.

8. *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 3 L.Ed.2d 1334 (1959).

one of those "businesses dealing widely with the public and having potentially monopolistic powers", the court below erred in failing to hold that the exculpatory provision of the City's tariff was invalid and unenforceable and the writ here sought should issue to correct this manifest error.

2.

The Decision Below Is In Conflict With The Position of the Federal Agency Designated By Statute To Enforce Just and Reasonable Regulations In This Field.

The holding of the court below that it was the view of the Federal Maritime Commission that a tariff of a terminal operator becomes effective upon filing misinterprets the Commission's position in its brief *amicus curiae* in that court. While the Commission did say that tariffs of terminal operators *may* be effectuated without the necessity of its approval, it also said that,

> ". . . The mere acceptance of a tariff does not constitute a determination that the tariff is in all respects lawful . . ."
>
> "Acceptance of a tariff by the Commission does not constitute approval of the terms contained therein. . . ."
>
> "The Federal Maritime Commission takes no position with respect to the liability of the City for the injury here involved, since actions for the recovery of damages for personal injuries like that involved here fall outside of this agency's jurisdiction, and this proceeding does not appear to present any factual questions which require the exercise of its special knowledge."

Thus, the Commission did not take the position in the court below that the exculpatory provision in the City's tariff here in issue became effective upon filing, but instead took the opposite view that filing did not make such provision lawful and expressly declined jurisdiction over this controversy.

This view is in accord with settled law that provisions not required by law to be included in tariffs, bills of lading and other similar documents filed with regulatory agencies do not become lawful simply because they are inserted in such documents, and that filing of such provisions does not constitute notice to anyone of the matters contained therein.

This Court has previously held in an analogous situation that illegal conditions in a tariff cannot be enforced. In *Boston & Main Railroad v. Piper,* 246 U.S. 439, 62 L.Ed 820 (1918), the railroad's bills of lading contained a provision limiting the carrier's liability for unusual delay and detention, caused by its negligence, to the amount actually expended by the shipper of cattle for the purchase of food and water for the cattle while so detained. The Court held that the provision contravened the principle that a carrier may not exonerate itself from its own negligence, and that even though the provision was in the bill of lading which was filed with the carrier's tariffs with the Interstate Commerce Commission, it gained nothing from that fact. The Court said:

> "The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body . . . *but not so of conditions and limitations which are, as is this one, illegal, and consequently void.*" (Emphasis supplied.)

The quoted language is particularly applicable here where the Federal Maritime Commission, the agency designated by statute to regulate and supervise operation of terminal facilities in foreign commerce, has taken the position that acceptance of a tariff for filing does not constitute approval of its terms or a determination that such terms are lawful, and that it has no jurisdiction to determine the validity of the provision here in question relating to the "loaned servant" issue and the City's liability for the plaintiff's injuries.

Nor can the filing by the City of the illegal provisions of Item 97 of its tariff with the Federal Maritime Commission be deemed to be notice of such provisions to Strachan under settled federal decisional law. In *Port of Tacoma v. SS DUVAL*, 364 F.2d 615 (9 Cir. 1966), the Port published a tariff (pursuant to the Shipping Act of 1916, 46 U.S.C. §§801-842) which provided in effect that the anti-lien provisions of any agreement or charter party purporting to prohibit the charterer from incurring maritime liens against a vessel under its control would not relieve the vessel from *in rem* liability for wharfage charges due the Port.

The Port contended that the tariff gave constructive notice to the shipowner and made the no-lien provisions of the charter party ineffectual. The Court of Appeals disagreed, saying at page 617:

> ". . . It is settled, however, that such filing gives constructive notice only ' * * * of everything contained in such published tariff schedules which is by law required to be inserted therein * * *.' *Pacific SS Co. v. Cackette*, 9 Cir., 1925, 8 F.2d 259, 260, cert. denied, 269 U.S. 596, 46 S.Ct. 203, 70 L.Ed.

> 426. We can find no such requirement of law as to the provisions of the tariff that purport to give the Port a lien valid against the owner in spite of the no lien provisions of the charter party."

Certainly, if a tariff provision purporting to render ineffectual the anti-lien clause in a charter party is unlawful, the release-from-negligence clause in the City's tariff here is presumptively invalid as a matter of law and cannot form the basis of the judgment of the court below exonerating the City from the negligent conduct of its Hoist operator and making this petitioner responsible for indemnifying the shipowner for its expenses of defending Rorie's suit.

(The Supreme Court of Texas held that the judgment in favor of the shipowner against Strachan for indemnity was proper because the *jury* found that Rorie's injuries were caused by the negligence of the hoist operator, whose negligence the *court* found constituted a breach of Strachan's implied warranty of workmanlike service under *Ryan*.[9] This holding effectively overrules the holding of the Court of Civil Appeals that the jury issues relating to the operator's negligence constituted a "global submission" under Texas practice. These issues being legally sufficient to establish the ship's action for indemnity against the stevedore, they must likewise be sufficient to support the plaintiff's action against the City, Strachan's counterclaim against the City and the claim of Texas Employers' Insurance Association for reimbursement of its compensation and medical payments.)

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9. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 100 L.Ed. 133 (1956).

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the decision and judgment of the Supreme Court of Texas.

Respectfully submitted,

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IN THE

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v.

CITY OF GALVESTON, *Respondent*

BRIEF IN OPPOSITION TO PETITIONS OF C. V. RORIE, STRACHAN SHIPPING COMPANY AND TEXAS EMPLOYERS INSURANCE ASSOCIATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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NOS. 71-886 and 71-890

IN THE

Supreme Court of the United States

October Term, 1971

C. V. RORIE, JR., ET AL, *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

BRIEF IN OPPOSITION TO PETITIONS OF C. V. RORIE, STRACHAN SHIPPING COMPANY AND TEXAS EMPLOYERS INSURANCE ASSOCIATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petition for Writ of Certiorari was heretofore filed under No. 71-886 on behalf of Strachan Shipping Company and Texas Employers Insurance Association. Petition was likewise filed under No. 71-890 on behalf of Petitioner, C. V. Rorie, Jr. Since both Petitions arise from the same action and raise substantially the same points, Respondent's Brief in Opposition is directed to both of such Petitions.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Texas, in affirming the Trial Court's Judgment Non Obstante Veredicto,

properly applied Federal and State substantive law to the case, in holding that the City of Galveston's duly published Tariff No. 4-B was controlling, wherein the Tariff provided that its crane and operator be leased to Strachan Shipping Company and that the stevedore shall have the right of control over the operator, being a loaned employee to the stevedore.

2. Whether or not the Respondent's Tariff No. 4-B needed prior approval of the Maritime Commission for its effectuation.

3. Whether or not the Tariff provision leasing the crane and operator, under loaned-servant doctrine to the stevedore, is unenforceable on its face.

4. Whether the decision of the Supreme Court of Texas denied Petitioner any right to a Jury trial.

5. Whether or not any federally created right of Petitioners was violated by the Court of Civil Appeals holding certain Special Issues improper and whether such alleged point of error was properly preserved for this Court's consideration.

STATEMENT OF THE CASE

Respondent takes issue only with statement of Petitioners that the Jury's findings were made "upon an abundance of testimony." Otherwise it is admitted that Petitioner, C. V. Rorie, Jr., a longshoreman, invoked the jurisdiction of the District Court of Galveston County, Texas, to recover damages for personal injuries sustained by him more than eleven (11) years ago, on September 6, 1960. There has been presented no issue of unseaworthiness or breach of duty of the City of Galveston to

perform any stevedoring services in a good and workmanlike manner.

The sole basis for recovery of Petitioner urged herein is based upon common law negligence as to Respondent.

REASONS FOR DENYING THE WRITS

I. THE DECISION OF THE TEXAS SUPREME COURT IS CONSISTENT WITH EXISTING FEDERAL ADMIRALTY LAW AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves, is a terminal operator of a port facility at Galveston, Texas. Strachan Shipping Company is a stevedoring company performing such services at the port. The Galveston Wharves' duly published Tariff is the one instrument evidencing the myriad contractual responsibilities and duties between Respondent, hereinafter called "Galveston Wharves", and its users, and, in particular, said Tariff outlines the terms of lease of the crane in question. (Appendix, p. 1). It is undisputed that the Tariff was duly published effective January 7, 1960, and a copy was sent to various shipping interests, including Petitioner, Strachan Shipping Company. (Appendix, pp. 4, 5). The Tariff provision pertaining to the lease of the crane and its operator had been in effect at the Galveston Wharves since July 1, 1958. (Appendix, p. 5). Strachan Shipping Company had, on numerous previous occasions, and on the occasion in question, accepted the use of the crane and its operator, though Strachan was free to use its own crane or lease cranes from someone else, if it desired. Strachan did so in many instances. (Appendix, p. 5).

The Supreme Court of Texas properly held that the Tariff in question was binding upon the City and all persons dealings with it, holding, with regard to the Tariffs:

> "They entered into and became a part of the Lease Agreement between the City and Strachan".

Additionally, the Texas Supreme Court held:

> "The two employers in this case (Galveston Wharves and Strachan) did, in effect, expressly agree that Strachan would have the right to control the hoist and its operator".

Texas City Terminal Railway Company v. American Equitable Assurance Company of N. Y. (USDC, S.D., Tex. 1955), 130 F. Sup. 843, and authorities therein cited.

The Court's decision followed, and is consistent with, the decision in *Southern Steamship Company v. Meyners* (C.A. 5th, 1940), 110 F.2d 376 (cert. denied, 311 U.S. 674, 85 L.E. 433), in which the Court of Civil Appeals for the Fifth Circuit considered the question of the effect of a lease of a crane and its operator to a stevedoring company under the terms of a terminal operator's Tariff. The situation in the *Meyner's* case, supra, is almost identical to that of the Galveston Wharves and Strachan, whereunder the Navigation District, under its Tariff arrangement with Southern Steamship Company, leased an overhead crane and its operator to Southern. Meyners was injured, alleging negligence of the crane operator. The Court, in considering the Navigation District's Tariff, which is very similar to that of the Galveston Wharves, applied the Tariff and found it binding on the parties.

The Court's Opinion is in no way contrary to *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 99 L.Ed. 911 (1955), since this Honorable Court's decision in the *Bisso* case is neither applicable to the instant case nor controlling.

In *Bisso*, supra, the Court considered a written Charter Contract between the owner of a tug and the owner of a barge damaged in the tow of the tug, providing that the movement shall be at the "sole risk" of the towed barge; and that the entire master, crew and employees of the tug should become employees of the barge. This Honorable Court there held that the attempt to shift sole responsibility from the carrier to the owner of the barge and the cargo being towed was against public policy and thus invalid. This Court there considered the loaned-servant provision as purely a fiction.

The facts in the *Bisso* case, supra, are entirely different from those in the case at hand. The Court, in *Bisso*, was dealing with a common carrier, or at least a contract carrier acting as such. The long-standing prohibition against a carrier's attempting to limit its liability to consignors and consignees in regard to interstate shipments to less than that prescribed by Federal law is well known and well accepted. However, this uniformly applied law applies only to loss or damage to cargo, containers or commodities involved in interstate transportation by a carrier. As the Texas Court properly held in its Opinion, the Galveston Wharves, in entering into a crane lease agreement through its Tariff, was certainly not operating as a common carrier.

The Galveston Wharves' Tariff does not attempt to limit its common-carrier liability with a stipulation from

its own negligence. A close reading of the applicable Tariff language shows no intent or implication that the Galveston Wharves is attempting to exculpate itself from its own negligence or that of its employees. The Galveston Wharves remains responsible to all persons for negligence from the entire complement of its employees, other than with regard to the particular lease of the crane in question, where the stevedore, as lessee, elects to accept the loaned employee of the Galveston Wharves to operate the crane.

There is certainly no monopoly or overreaching by the Galveston Wharves in leasing the crane in question. It is one piece of specialized machinery provided by the Galveston Wharves to all who care to use it. It is a convenience provided for persons who care to use it, but stevedores are free to use their own cranes or lease cranes from somebody else, if they so desire, which they have done in many instances. (Appendix, p. 5).

Cases cited by Petitioner deal with attempts by common carriers to exculpate themselves from any liability or to limit the common carrier's liability for loss or damage to cargo and containers. *Boston & Maine Railroad v. Piper*, 246 U.S. 439, 62 L.Ed. 820 (1918); *Southern Express Company v. Caldwell*, 22 L.Ed 556 (1875); *Boston Metals Company v. SS WINDING GULF*, 349 U.S. 122, 99 L.Ed. 933 (1955); and *Dixilyn Drilling Corporation v. Crescent Towing & Salvage Company*, 372 U.S. 697, 10 L.Ed.2d 78 (1963). None of these cases speak to the Tariff provisions of the terminal operator with regard to the lease of a crane and its operator.

Even were the Tariff lease agreement considered to be an exculpatory clause, which it certainly is not, it would not be void and unenforceable on its face. *Southwestern*

Sugar & Molasses Company v. River Terminal Corporation, 360 U.S. 411, 3 L.Ed.2d 1334 (1959). This Honorable Court therein considered an action filed against the water carrier for loss of cargo and sinking of Petitioner's barge, which was being towed by carrier, wherein the carrier's Tariff had a provision exculpating the tug-carrier from liability for lost cargo, where such cargo was being transported in a barge furnished by the owner. This Honorable Court there held that such a proviso was not illegal on its face, holding:

> "We hold that the Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded reasonable opportunity to obtain from the ICC, in an approprate formal proceeding, a determination as to the particular circumstances of the tugboat industry which lends justification to this form of clause, if any there be, or which militate toward a rule holding, validating such provisions, regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulations."

II. THE COURT BELOW PROPERLY HELD THAT TARIFF NO. 4-B OF RESPONDENT WAS LEGAL, DID NOT REQUIRE PRIOR APPROVAL OF THE MARITIME COMMISSION, AND WAS BINDING BETWEEN THE PARTIES.

The evidence is undisputed that the Galveston Wharves' Tariff was filed with the Federal Maritime Commission prior to and at the time of plaintiff's injury. It is further admitted that no formal Order of Approval was issued by said Commission. The City of Galveston duly published the Tariff in question, effective January 7, 1960,

and sent a copy to various shipping interests, including Petitioner, Strachan Shipping Company. (Appendix, pp. 4, 5). Strachan Shipping Company had, on numerous previous occasions and on the occasion in question, accepted the use of the crane and its operator, although Strachan was free to use its own crane or lease cranes from someone else, if it desired. Strachan did so in many instances. (Appendix, p. 5).

Prior to June 1, 1967, the Maritime Commission did not even require the filing of Tariffs much less approval of same. By its General Order 15, dated October 5, 1965, 30 FR 12681, the Commission provided for the filing of Tariffs and Tariff changes before the effective date, except as required by Commission Order or Agreements approved pursuant to Section 15 of the Shipping Act of 1916 (46 USC, Sec. 814).

A wharf Tariff pertaining to the leasing of a shore-based crane is not such an agreement as described in Section 15 of the Act, as evidenced by the plain language of Section 15. (Appendix, p. 2). With regard to the necessity of seeking approval of the Maritime Commission of wharf terminal Tariffs, the Court, in *Bird v. S.S. FORTUNA* (USDC, Mass. 1966), 262 F. Sup. 24, 26, said:

> "Analogous provisions in the Shipping Act require Commission approval of Tariffs established by carriers, 46 USC, Sec. 817, but not of Tariffs of non-carriers, such as wharf operators."

The Maritime Commission, in its Amicus Curiae Brief filed in the Supreme Court of the State of Texas, acknowledged that it requires Tariffs of terminal operators furnishing services in connection with common carriers by

water to file their duly published Tariffs, but stated that there is no requirement for approval of such Tariffs prior to their effectuation. The Commission, in its Brief, states that Tariffs which have been filed in conformance with the requirements of the Commission's General Order 15 become effective when filed on or before their effective date, as provided by such Order, unless rejected by the Commission. (Appendix, p. 3). The Commission has, in fact, in the past specifically investigated in a formal proceeding the validity of the Galveston Wharves' Tariff No. 4-B, and, in *Selden & Company v. Trustees of Galveston Wharves*, 7 FMC 679 (1964), the Commission found lawful a Tariff amendment to Tariff No. 4-B, whereby Galveston Wharves increased demurrage charges by mere publication of the Tariff providing such increase, the Commission specifically holding that the Tariff Amendment issued and filed with the Commission was in effect and binding upon Selden & Company.

Apparently Petitioner, Strachan Shipping Company, though abiding by and operating under the Galveston Wharves' Tariffs for years and accepting and using the crane and its operator, now contends that the Tariff is not binding on it. If the Galveston Wharves' Tariff is not the instrument evidencing the myriad contractual responsibilities and duties between the Galveston Wharves and its users, then what instrument does establish this contractual relationship? The *Port of Tacoma v. SS DUVAL*, 364 F.2d 615 (9th Cir. 1966), is of little solace to Petitioners, since the Court there held that the provision of the Port's Tariff, purporting to give the Port a lien, did not give constructive notice of the lien provision in the Tariff to the owner of a vessel in derogation of the owner's rights under its Charter. In this case, the evidence is

uncontroverted that Strachan Shipping Company was furnished a copy of the applicable Tariff. Therefore, it had actual notice of the Tariff provisions.

Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 19 L.Ed.2d 1090 (1968), cited by Petitioner, is just not in point. The *Volkswagenwerk* case involved a written Agreement between a Maritime Association on the Pacific Coast with Union representatives, which Agreement required a $29,000,000.00 levy over five (5) years, bound all principal carriers, stevedores and terminal operators on the Pacific Coast, and necessarily resulted in substantial increase in stevedoring and terminal charges. This Honorable Court there held that the Maritime Commission erred in holding that such an Agreement was of a de minimus or routine nature and did not require filing and approval under Section 15, in view of the enormity of the proposal and its obvious substantial effect on the maritime industry.

The Texas Supreme Court further properly held, as a secondary basis for its ruling that the Tariff in question is not a type of agreement required to be filed under Section 15 of the Shipping Act of 1916 for effectuation, that the Tariff lease provisions, though an agreement binding on the parties, do not constitute an agreement made by a common carrier by water or other persons subject to the Chapter "with another such carrier or other person subject to the Chapter". The Court pointed out that, though the Galveston Wharves is clearly "other person subject to the Chapter" by reason of operating its terminal facility in connection with a water carrier (46 USCA, Sec. 814), there is no evidence to suggest that Strachan is either a common carrier by water or "other person subject to this Chapter", within the meaning of the statute.

Strachan Shipping Company is a stevedoring company only, and there is no evidence that it is a terminal operator or a common carrier by water. It is much in the same position as the stevedoring company in *Henry Gillen's Sons Lighterage, Inc., et al v. American Stevedores, Inc., et al*, 12 FMC 325 (1969), in which the Maritime Commission ruled that a stevedoring company, not performing any terminal operations and not being a common carrier by water, is not "other persons subject to the Act". The Commission said:

> "It seems reasonable to assume that stevedoring as such was excluded simply because stevedores, to the extent that their services are rendered in connection with common carriers by water, are merely servants or contractors employed by carrier or terminal operators who are subject to the Act."

III. NO RIGHT OF TRIAL BY JURY WAS DENIED PETITIONER RORIE BY THE COURTS BELOW.

No right of trial by Jury was abridged by the Judgment of the Trial Court notwithstanding the verdict, or by the affirmance of the Trial Court's Judgment by the Texas Supreme Court. Under the decision of the Texas Supreme Court, the question of "right to control the operator of the crane" was foreclosed as a matter of law; the only question remaining for Jury determination was whether the City interfered with such right of control. As the Texas Supreme Court stated (at p. 9 in Petitioner's Appendix):

> "There is no evidence here that the City had ever interfered with a lessee's right to control the equip-

> ment and its operator, and it does not appear that the supervisor or any other representative of the City attempted to exercise any control over the manner in which McPeters operated the hoist in unloading the vessel for Strachan. In our opinion the evidence in this case will not support the conclusion that, despite the provisions of the Tariff, McPeters remained under the City's control in his operation of the hoist on the occasion in question".

The Texas rule, as is the rule in Federal Courts, is that a Trial Court may not disregard Jury findings of fact and enter Judgment notwithstanding a verdict, unless there is no evidence of probative value upon which the Jury could have relied in making its determination of fact. *Burt v. Lochausen*, 249 S.W.2d 194, 199 (Tex. S.Ct. 1952); and *Lavender v. Kurn* (1946), 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916.

The rule is firmly established, and not denied by Petitioner, that when a claim founded in Federal law is triable and tried in a State Court, the State Court rules of practice and procedure are to be applied.

For example, the decision of this Court in the Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U.S. 1, 56 L.Ed. 327, 32 S.Ct. 169, a suit brought under the Federal Employer Liability Act, stated:

> "There is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State Courts or to control or affect their modes of procedure, but only the question of the duty of such a Court, when its ordinary jurisdiction is prescribed by local rules and is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of

an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

There are numerous cases supporting the proposition that State rules of practice and procedure may govern such questions as the manner and form of directing verdicts, the formal basis on which verdicts may be sustained, and the necessity, form and effect of instructions to the Jury. This Court, in *Chesapeake and Ohio Rail Co. v. DeAtley* (1916), 241 U.S. 310, 60 L.Ed. 1016, 36 S.Ct. 564, approved the assumption of the State Court that a local rule of practice, requiring that the Court substitute a proper instruction for one requested which was incorrect in form or substance with respect to any issue upon which the Jury should be instructed, was applicable.

Further, other decisions of this Court in the litigation of personal injury claims grounded on Federally created rights have firmly established that, although the right to trial by Jury is one which is to be zealously guarded, State practice of allowing verdicts by Juries of less than twelve (12), and by less than unanimous verdicts, may be followed in cases brought in State Courts. *St. Louis & S. F. R. Co. v. Brown* (1916), 241 U.S. 223, 60 L.Ed. 966, 36 S.Ct. 602; *Louisville & N. R. Co. v. Stewart* (1916), 241 U.S. 261, 60 L.Ed. 989, 36 S.Ct. 586; and *Chicago R. I. & P. R. Co. v. Ward* (1920), 252 U.S. 18, 64 L. Ed. 430, 40 S.Ct. 275.

The Court, in *King v. Schumacher* (1939), 32 Cal. App. 2d 172, 89 P.2d 466, (cert. den'd., 308 U.S. 593, 84 L.Ed. 496, 60 S.Ct. 123), held that a State rule, to the effect that a general verdict will be sustained if it can

be justified on the basis of any one of the theories set forth in the complaint, was applicable, regardless of whether it was in conflict with the practice in Federal Court, stating that where an action founded on a Federal statute is properly brought in the State Courts, the law of the State, in the absence of any contrary provisions in the Federal statute, is controlling in all manners of practice and procedure.

The Court, in *Marshall v. Chicago R. I. & P. R. Co.* (1916), 133 Minn. 460, 157 N.W. 638 (err. dism'd., 246 U.S. 678, 62 L.Ed. 934, 38 S.Ct. 333), held that it was proper to use a State procedure for directing Judgment notwithstanding a verdict for the plaintiff, stating that it could not perceive such practice represented any greater departure from that followed in Federal Courts in allowing less than unanimous verdicts.

The California Court, in *Woodward v. Southern Pacific Co.* (1939), 35 Cal. App. 2d 130, 94 P.2d 1028 (cert. den'd., 309 U.S. 671, 84 L.Ed. 1016, 60 S.Ct. 614), held that the law of the forum is controlling with respect to the matter of directing a verdict and the entry of Judgment notwithstanding the verdict.

None of the cases cited by Petitioner are controlling, or even persuasive, of the issue before this Court. *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942), concerned the question of the validity of a Release executed by a Seaman. This Court, emphasizing the traditional protected status of Seamen, held that a State rule, casting the burden of proof that a Release was invalid on the party alleging the invalidity of the Release, must yield to the Federal rule, supported by specific statutory provisions that where the claimant

and person executing the Release is a Seaman, the burden of proving the Release valid is on the party arguing in favor of such validity.

McAllister v. Magnolia Petroleum, 357 U.S. 221, 2 L. Ed.2d 1272, 78 S.Ct. 1201 (1958), and *Flowers v. Savannah Machine & Foundry Co.*, 310 F.2d 135 (5th Cir. 1962), both turned on the question of what statute of limitations to apply. The holdings in these cases were that to apply the shorter State statute of limitations, or to use it by analogy for determining when latches would run under Admiralty rule, rather than using the longer limitation period provided under the F.E.L.A., would abridge the rights of claimants. The statute of limitations was denominated substantive rather than procedural.

All three (3) of these cases, of course, recognized the general rule that, in the trial of a claim based on Federal law in State Court, where it is triable there, State rules of practice and procedure apply.

The case of *Pope and Talbot v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), also cited by Petitioner, is not in point. Here, plaintiff brought suit in the Federal District Court in Pennsylvania under diversity jurisdiction. The defendant argued that Pennsylvania substantive law should, therefore, be applied, since this was a diversity suit, and that questions of contributory negligence were proper ones to be used as the common law rule which was in effect in Pennsylvania. Plaintiff had alleged both unseaworthiness and Jones Act negligence. This Court did not decide whether it had jurisdiction under "diversity" or "arising under", but held that, in any case, in enforcing this claim, Federal Courts would apply their own practice and procedure.

The case of *United Industrial Workers of Seafarers International Union of North America, etc. v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), is completely irrelevant and not in point. This litigation involved a Contract dispute which arose when the Galveston Wharves leased a grain elevator (Elevator B) to the Bunge Corporation during the term of an Employment Contract between the Wharves and the Union. Under the Lease, Bunge took over the operations at the grain elevator entirely and the City went out of the business of operating the elevator and, therefore, laid off its men. The dispute involved whether the City had a right to do this, since there was a valid Employment Contract with the Union in effect, and whether the City was obligated to bargain with the Union about this as a change in working conditions.

IV. HOLDING OF THE COURT OF CIVIL APPEALS THAT SPECIAL ISSUES 12 AND 13 WERE IMPROPERLY SUBMITTED UNDER TEXAS PROCEDURAL LAW WAS PROPER, AND, IN ANY EVENT, PETITIONERS FAILED TO PRESERVE THE ALLEGED POINT OF ERROR THAT SUCH ACTION VIOLATED ANY FEDERALLY CREATED RIGHT.

This Court should not consider the alleged Point of Error attacking the holding of the Court of Civil Appeals that Special Issues 12 and 13 were global, and thus improper, because Petitioners failed to urge their objections that such holding violated Federal standards in their Application for Writ of Error to the Texas Supreme Court, and such Court, therefore, had no opportunity to pass upon the question. Petitioners did not properly assert the

question of violation of Federal standards at the appropriate time below, but merely urged this Point of Error as a matter of State law. Further, this point is purely a matter of State procedure.

The Texas Supreme Court did not rule on this question and, therefore, this Court does not have jurisdiction under Title 28, Section 1257, Subdivision 3, or under Rule 19a of the Rules of the Supreme Court.

As the Texas Supreme Court held that McPeters, the crane operator, as a matter of law, was the loaned-servant of Strachan (on the twin grounds that the Petitioners were bound by the provisions of a properly filed Tariff and that, as Strachan had notice of the Tariff provisions, such Tariff provisions were in any case incorporated in and made a part of the Contract between the Respondent and Strachan), no decision on the alleged global nature of the Issues was necessary, and the Supreme Court did not pass on the question. Further, the Supreme Court held that there was no evidence in the record whatsoever showing that the City had interfered with Strachan's right of control.

The next to the last paragraph in the Texas Supreme Court's Opinion, which Petitioner seems to be contending shows that the Court did pass on this issue, does not bear out this contention. This paragraph of the Texas Court's Opinion simply holds that, as to Strachan, the Jury finding on this issue is binding, because Strachan made no objection to the issue in the Trial Court and, in fact, had argued for its validity and appropriateness all during the appellate process. Strachan had, therefore, waived any complaint as to the form of this submission to the Jury, and was bound by the Jury's finding on it. *Texas Rules*

of Civil Procedure, Rule 274. See also *Federal Rules of Civil Procedure, Rules 46 and 51.*

It is, likewise, well settled, by decisions of this Court, that, in order to secure review by this Court of a State Court's ruling on a Federal question, or on such a ruling which affects a right asserted under Federal law, the Petitioner must raise his Federal question or Federal right clearly at the appropriate time before the State Courts. *Montana v. Rice*, 27 S.Ct. 281; 204 U.S. 291, 51 L.Ed. 490 (1907). In the *Rice* case, supra, the Court held that the raising of the Federal question for the first time in a Petition for a Writ of Error to a State Court and the accompanying assignment of errors is not sufficient to enable the Federal Supreme Court to consider that question, even though another Federal question had been properly raised and brought up by the same Writ of Error. To the same point, the Court, in *Louisville & N. R. Co. v. Woodford*, 34 S.Ct. 739, 234 U.S. 46, 58 L.Ed. 1202 (1914), stated:

> "The decisions of this Court have not only repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in a State Court, but have often held that such claim of denial is not properly brought to the attention of this Court where it appears that the State Court declined to pass on the question because it was not raised at the Trial Court, as required by State practice".

See *Radio Station WOW, Inc. v. Johnson*, 65 S.Ct. 1475, 326 U.S. 120, 89 L.Ed. 2092 (1945), holding that where a question is first presented to the highest State Court on a Petition for Rehearing, it came too late for consideration by the Federal Supreme Court on certiorari, unless the

State Court exerted its jurisdiction in such a way that the case could have been taken to the Federal Supreme Court if the question had been raised prior to the original disposition. See *Atlantic Coast Line R. Company v. Mims*, 244 U.S. 532, 61 L.Ed. 476, 37 S.Ct. 188 (1917).

The form and appropriateness of the submission of Special Issues 12 and 13 is purely a matter of State procedure. The question of whether Special Issue No. 12 appropriately submitted the issue of negligence of McPeters to the Jury is certainly distinguishable from the issue involved in the cases cited by Petitioner. For example, *McAllister v. Magnolia Petroleum Company*, supra, considered a case involving the basic definition of "unseaworthiness", which this Court took cognizance of "in furtherance of sound judicial administration". The definition of a basic substantive right of a claimant in a maritime case is certainly distinguishable from the mere procedural matter of the form of an Issue submitting to the Jury the question of negligence on the part of a person alleged to have been at fault in causing the injuries complained of.

Holding that State rules of practice and procedure govern such questions as the manner and form of directing verdicts and the necessity, form and effect of instructions to the Jury are *Chesapeake & Ohio Railway Company v. DeAtley*, supra; *King v. Schumacher*, supra; *Woodward v. Southern Pacific*, supra; and *Marshall v. Chicago R. I. & P. R. Co.*, supra.

Accordingly, the alleged Point of Error, that the Court of Civil Appeals, in holding Special Issues 12 and 13 to be improper under State procedural law, in violation of Federal standards, has not been preserved for this Court's

consideration, and, has not been passed upon by the Court of last resort of the State of Texas, and, in any event, the Court of Civil Appeals' ruling was proper.

CONCLUSION

It is, therefore, respectfully prayed that the Petitions for Certiorari should be denied in their entirety.

Respectfully submitted,

McLEOD, ALEXANDER, POWEL & APFFEL

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of February, 1972, a true and correct copy of the foregoing was mailed to:

Mr. Arthur J. Mandell
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Attorneys at Law
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Mr. Ted Goller
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Attorneys for Strachan Shipping Company
and Texas Employers' Insurance Company; and

Mr. Bryan F. Williams, Jr.
Messrs. Royston, Rayzor & Cook
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Attorneys for Avenue Shipping Company, Ltd.,
and Trinder, Anderson & Company, Ltd.

by placing the same in properly addressed envelopes, postage prepaid, and depositing the same in the United States Mails.

Benjamin R. Powel

BENJAMIN R. POWEL

APPENDIX

NOS. 71-886 and 71-890

IN THE

Supreme Court of the United States

October Term, 1971

C. V. RORIE, JR., ET AL., *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

APPENDIX TO

BRIEF IN OPPOSITION TO PETITIONS OF C. V. RORIE, STRACHAN SHIPPING COMPANY AND TEXAS EMPLOYERS INSURANCE ASSOCIATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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APPENDIX

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APPENDIX

EXCERPTS FROM GALVESTON WHARVES TARIFF CIRCULAR NO. 4-B, naming Rules and Regulations governing Dockage, Shed Hire and Other Services and Charges Applying at the Facilities of the Galveston Wharves:

Item No. 25—Subject: *Responsibility for Charges, Etc.*

The use of the waterways and facilities under jurisdiction of the Galveston Wharves shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 70 or reissues, and to be governed by all rules and regulations contained in this tariff.

Item No. 97—Subject: *Lessee Responsibility:*

When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be

considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters.

46 USCA, Section 814, provides in part:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements. . . .

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications,

and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

EXCERPT FROM AMICUS CURIAE OF THE FEDERAL MARITIME COMMISSION, IN THE TEXAS SUPREME COURT:

Although, as we have indicated, tariffs of terminal operators furnishing services in connection with common carriers by water are required to be filed pursuant to the Commission's General Order 15 (46 C.F.R., Sec. 533), there is no requirement for approval of such tariffs prior to their effectuation. Tariffs which have been filed in conformance with the requirements of the Commission's General Order 15 become effective when filed on or before their effective date as provided by such order, unless rejected by the Commission.

Although courts have, from time to time, spoken of regulatory agencies as "approving" tariffs, the word has been used only for the purpose of showing that provisions in a tariff which are required to be filed with a regulatory agency may not be applied unless such tariff is lawfully on file with the agency. Thus, for example, in *Lichten v. Eastern Air Lines*, 189 F.2d 939 (2d Cir. 1951), the word "approve" is used as being synonymous with the word "accept".

EXTRACTS FROM REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

(357) E. C. ROBINSON, Former Traffic Manager for Galveston Wharves

MR. McLEOD: Let me rephrase the question. I will ask you whether or not Tariff No. 4-B was filed with the Federal Maritime Commission.

A: It was.

Q: Did you yourself file that?

A: Yes. It was mailed from my office on the date of issuance, December 4, 1959.

Q: In addition to filing this with the Federal Maritime Commission, I will ask you whether or not you sent copies of this to the various shipping agents, shipping companies and stevedoring firms operating in the City of Galveston.

A: We did.

Q: And particularly I will ask you whether or not a copy of this was sent to Strachan Shipping Co.

A: It was.

Q: At the time of issuance?
A: Yes, sir.
Q: What was the effective date of this particular tariff?
A: January 7, 1960.
Q: I will ask you whether or not that tariff was in effect on September 6, 1960.
A: Yes.

(361)

MR. McLEOD: How long before September 6, 1960, was a similar Item 97 in the tariffs of Galveston Wharves?

A: Item 97 of Supplement A to Galveston Wharves Circular 4-A was published effective July 1, 1958.

MR. McLEOD: Then, I will ask you whether or not the same tariff provision as Item 97 has been in effect since July 1, 1958.

A: Yes, sir. That item was brought forward in the reissue of the tariff. It was brought forward as Supplement A to the tariff here up to the present time.

(465) W. H. SANDBERG, Retired General Manager of Galveston Wharves

Q: I will ask you whether or not the stevedores were free to use their own cranes or somebody else's cranes if they so desired.
A: They had that right, and they did in several, in many instances.
Q: Well, have there been instances, and were there instances back around the time of September, 1960, where stevedores actually used their own cranes?

A: Yes. In fact we have one case where a stevedore used his own crane and his own operator, and this Maintenance of Way Union made a case of it before the Mediation Board, and the Mediation Board upheld Galveston Wharves, that it was permissible.

Q: That it was permissible?

A: Yes, sir.

Q: Was there any rule or regulation or requirement of any kind of the Galveston Wharves that would prohibit a ship from using its own winches to unload a ship such as a ship with a cargo of ore?

A: We had no restrictions.

Q: Well, is it fair to say that it was up to the stevedore whether to rent your equipment or not and that he was free to use other means, including other cranes, if he wanted to, to unload a ship?

A: It was his prerogative.

(525) FRANK J. GARCIA, Ship Foreman

Q: Have you seen them use any type of crane down there?

A: On Pier 14?

Q: Wherever they load U. A. R. flour.

A: Oh, yes. They use them mobile cranes.

Q: And you have seen cranes used down there that didn't belong to Galveston Wharves, haven't you?

A: Yes, sir.

Q: That is all. Thank you.

(579) JOHN W. CAIN, Operating Engineer for Atlantic & Gulf Stevedores

Q: What about cranes for heavy lifts, barge-type cranes, have you used those?

A: I have used them, but there isn't any in Galveston. It has been quite some time back.

Q: Galveston Wharves doesn't have those for rent?

A: No. Galveston Wharves doesn't have those.

Q: Have you seen any cranes working in areas in the Port of Galveston where there was no trackage, railroad trackage?

A: Yes. I have seen them working on Pier 26.

Q: When was that?

A: About two weeks ago.

Q: There were no tracks on Pier 26?

A: No, no tracks on Pier 26.

Q: Do you know who owned the crane in that instance?

A: I believe it belongs to a company called Allied—well, the last name I couldn't tell you. I think it is a local company.

(584)

Q: I believe you told us there are some cranes available here in the Galveston area. You mentioned one in particular, the Allied; is that correct?

A: Yes. They are available as far as I know. I have never used them.

Q: But you have seen them being used?

A: I have seen them on Pier 26.

Q: Have you seen any other cranes operating on any other piers in Galveston other than Pier 26 that didn't belong to the City of Galveston?

A: Yes, I have seen some, I think, at Pier 39. I believe they had one down there some time back, a rubber-tired crane.